Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DR. GUILLERMO HOYOS AND
DR. HECTOR O. RIVERA-GONZALEZ,

Petitioners,

v.

GRAND CID CAMILO-ROBLES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

RAMON VAZQUEZ
Counsel of Record
ROBERTO LEFRANC ROMERO
MARTINEZ-ALVAREZ,
MENENDEZ CORTADA
& LEFRANC ROMERO, PSC
Centro de Seguros Bldg.
Suite 407
701 Ponce de León Ave.
Miramar, San Juan, PR 00907
Telephone (787) 721-1140
Facsimile (787) 721-7866

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Whether the District Court and Circuit Court erred in denying the request of two psychiatrists (Dr. Hoyos and Dr. Rivera) for summary judgment based on: (a) their actions cannot be considered "callous or reckless" amounting to a violation of plaintiff's constitutional or civil rights in accordance with 42 USC Section 1983, (b) there is a lack of causal connection between the psychiatric evaluations performed by Dr. Hoyos and Dr. Rivera on Police Officer Miguel Díaz-Martínez and said officer's alleged intervention with Mr. Camilo, (c) there exists qualified immunity for Dr. Hoyos and Dr. Rivera, (d) Dr. Hoyos and Dr. Rivera are immune from liability (inexistence of a cause of action) under the Commonwealth of Puerto Rico's public policy, laws, and jurisprudence.

LIST OF PARTIES IN THE COURT BELOW

The parties to the proceedings before the United States Court of Appeals for the First Circuit were: Grand Cid Camilo-Robles (appellee in all consolidated appeals), Dr. Guillermo Hoyos and Dr. Héctor O. Rivera-González (appellants in 97-2260), Pedro A. Toledo-Dávila (appellant in 97-2261), Gilberto Díaz-Pagán (appellant in 97-2262), and Pablo Santiago-González (appellant in 97-2264).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Dr. Guillermo J. Hoyos ("Hoyos") and Dr. Héctor O. Rivera-González ("Rivera") respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the First Circuit entered in this case on June 29, 1998, in order to establish that the doctrine of qualified immunity is applicable to the present case and that the appellate court erred in its appreciation of the record as a whole.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition is published as *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998). By order dated August 18, 1998, the First Circuit denied a petition for rehearing and suggestion for rehearing en banc.

JURISDICTION

On August 28, 1997, the United States District Court for the District of Puerto Rico issued an Order denying summary judgment requested by several defendants, including Dr. Hoyos and Dr. Rivera, in *Grand Cid Camilo-Robles v. Miguel Díaz-Martínez*, et al., Civil 95-1540 (CC). On September 8, 1997, Hoyos and Rivera filed a notice of appeal to the United States Court of Appeals for the First Circuit. Other defendants also filed notices of appeals. All

appeals were consolidated (Nos. 97-2260 to 97-2262 and 97-2264), all briefs were filed (including a reply brief by Hoyos and Rivera), and oral argument was heard on February 25, 1998. On June 29, 1998 the First Circuit issued an Opinion which is published as *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998).

Defendant-Appellant Pedro Toledo-Dávila filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the First Circuit on August 18, 1998. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

The federal statutory provisions are 42 USC Sections 1983 and 1988.

The statutory provisions of the Commonwealth of Puerto Rico are 4 LPRA App. I-A; 26 LPRA Sec. 4105, and 31 LPRA Sec. 5141.

Puerto Rico Police Department Personnel Regulations, Sections 9.3 (1)(a) and (d) which state:

> (a) "All members of the Force shall wear such regulation weapons as the Superintendent may

determine. This weapon must be carried in its holster and be duly secured."

(d) "The [Police] Superintendent shall have discretion to not assign or confiscate the regulation weapon in those cases where he deems it appropriate."

STATEMENT OF THE CASE

This is a Civil Rights action brought by plaintiff, Mr. Grand Cid Camilo-Robles (Mr. Camilo), under 42 USC Sections 1983 and 1988, and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, alleging that his civil rights were violated by several defendants, including Dr. Hoyos and Dr. Rivera.

Appearing petitioners Dr. Hoyos and Dr. Rivera are licensed psychiatrists who worked for the Puerto Rico Police Department's Medical Division, where they performed psychiatric evaluations of police officers and civilian personnel working for the Police Department, when said persons were referred by their superiors for evaluation.

Because of Dr. Hoyos and Dr. Rivera's psychiatric evaluations of police officer Miguel Díaz-Martínez, who was reinstated to the Puerto Rico Police Department in compliance with a court order dated December 11, 1992, Mr. Camilo alleges that Dr. Hoyos and Dr. Rivera's professional judgment was grossly negligent amounting to deliberate and/or callous and/or reckless indifference to his constitutional rights. Furthermore, he alleges that appearing petitioner's psychiatric evaluations of Miguel

Díaz-Martínez were a proximate cause of the alleged violations of his civil or constitutional rights.

It must be noted that a similar suit against Dr. Hoyos and Dr. Rivera, among other defendants, was filed before the Puerto Rico District Court, Civil No. 94-2184 (HL), by Mr. Camilo's attorney, Mr. Peter Berkowitz, alleging in essence the same facts against the psychiatrists that are alleged in the instant case, the only difference being that in the present case police officer Mr. Miguel Díaz-Martínez was subjected to an additional psychiatric evaluation which was also performed by appearing petitioners on February 28, 1994. Said psychiatric evaluations reflected that there were no adverse psychopathological findings and therefore Díaz-Martínez could perform all functions of a police officer. This Court may take judicial notice that in Civil No. 94-2184 (HL), an Opinion and Order (Appendix 37) as well as a Partial Judgment (Appendix 49) were issued, on July 18, 1996, in which the complaint against Dr. Hoyos and Dr. Rivera was dismissed with prejudice pursuant to 42 USC Section 1983. It was also established that even assuming that the psychiatrists erred in their evaluations of Díaz-Martínez, any such errors did not constitute recklessness in the criminal law sense, and they did not demonstrate that the psychiatrists acted with a culpable state of mind and intended wantonly to inflict pain.[1] As we will discuss, there is no

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[1] This Honorable Court may take judicial notice of Appeal No. 97-1755 filed before the United States Court of Appeals for the First Circuit by Mr. Peter Berkowitz, Esq. (same attorney as the present case) on behalf of other plaintiffs regarding Dr. Hoyos and Dr. Rivera's psychiatric evaluations of Miguel Díaz-Martínez and the Honorable District Court's (District of Puerto

genuine issue of fact as to whether Dr. Hoyos and Dr. Rivera acted with deliberate indifference. Furthermore, even assuming so (which we deny), a Section 1983 plaintiff must show that a defendant's conduct caused the deprivation of his constitutional rights. Dr. Hoyos and Dr. Rivera in no way determined whether Díaz-Martínez or any other police officer would be allowed to carry a firearm, because the Puerto Rico Police Department regulations provide that it is Puerto Rico's Police Superintendent, not the medical division psychiatrists, who determine whether an officer will be allowed to carry a firearm. The psychiatric examination is only one of the many procedures and facts taken into consideration to arm or rearm a police officer. Dr. Hoyos and Dr. Rivera were not Díaz-Martínez's supervisors. They conducted a medical examination of Díaz-Martínez which revealed that there were no psychopathological findings. Their professional judgment has not been controverted, to the contrary it was confirmed by Mr. Camilo's expert witness in psychiatry (Appendix 84).

It must also be noticed that in the present case, it was not alleged that Mr. Díaz-Martínez used his regulation weapon against plaintiff; his carrying a weapon (regulation gun) has no relation to the facts alleged to constitute a violation of the civil rights of plaintiff.

Dr. Hoyos and Dr. Rivera are qualified immune. Under the laws of the Commonwealth of Puerto Rico as

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Rico) determination on Civil No. 94-2184 (HL). The First Circuit dismissed said appeal for lack of jurisdiction.

interpreted by Puerto Rico's Supreme Court, even assuming that they committed an act or omission that could be deemed as negligent, they are immune from liability because the law establishes that no cause of action can exist.

The Honorable District Court, without stating any reason or reasonable grounds, issued an Order on August 28, 1997, (Appendix 35), denying Dr. Hoyos and Dr. Rivera's request for summary judgment. Mr. Camilo's opposition merely states factual assertions by his counsel which are insufficient to establish the existence of a genuine issue of material fact to defeat appearing psychiatrist's request for summary judgment. *Fragoso v. López*, 991 F.2d 878 (1st Cir. 1993).

The legal dispositions and Puerto Rican case law establish the clear applicability of immunity in the present case. Dr. Hoyos and Dr. Rivera's involvement with police officer Miguel Díaz-Martínez was limited to performing certain psychiatric evaluations of said police officer, per referral from Puerto Rico's Police Department. This took place while Dr. Hoyos and Dr. Rivera were working for the Police Department, in the Police Department's facilities. Immunity from suit is granted in accordance with Dr. Hoyos and Dr. Rivera's contracts, as well as state law and jurisprudence. See *Lind-Rodríguez v. Commonwealth*, 112 DPR 67 (1982), Appendix 54; *Flores-Roman v. Ramos*, 127 DPR 601 (1990), Appendix 58. Federal courts should apply state law when it clearly confers immunity or when it is clear that the course followed by state courts grants or confers immunity. See *Nieves v. University of Puerto Rico*, 7 F.3d 270, 275 (1st Cir. 1993), citing *Porter v. Nutter*, 913 F.2d 37, 41, n.4 (1st Cir. 1990).

Dr. Hoyos and Dr. Rivera are immune from suit. However, if this Honorable Court determines that Dr. Hoyos and Dr. Rivera are not immune according to the laws of the Commonwealth of Puerto Rico and according to Puerto Rico's Supreme Court interpretative jurisprudence, as the Circuit Court has determined, we respectfully submit that this issue should be addressed by the Puerto Rico Supreme Court; in such a case, we would respectfully pray from this Honorable Court to request a certification in this issue from Puerto Rico's Supreme Court, Appendix 52-53.

After an elaborate opinion where many inferences were made by the First Circuit,[2] the opinion states in the first paragraph of its conclusion:

> "We add an eschatocol of sorts. This is a hard case, for it does not readily fit the mold cast by the Court's precedents. We believe it is possible that the Court, when confronted with a claim of qualified immunity in a deliberate indifference case, may recognize the awkwardness of the fit

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[2] Some of said inferences deal with an administrative record of complaints against Police Officer Díaz-Martínez that was not available to appearing petitioners due to the fact that Díaz-Martínez had recently been reinstated to Puerto Rico's Police Department due to a court order following an expulsion and he started with a "clean" record.

In addition the opinion also relies on an incident that took place on September 8, 1993. It omits the fact that the preliminary investigation revealed that Díaz-Martínez's actions were in self defense. It is not until a year later, after the Camilo incident, when a Department of Justice investigation reveals that Díaz-Martínez's actions on September 8, 1993 where criminal in nature.

> and formulate a special set of rules to cover such situations. Until further guidance emerges, however, we have little choice but to apply the existing qualified immunity paradigm across the board. We have endeavored to do so here."

In its opinion the First Circuit states through footnote 8:

> "The Supreme Court has not yet decided whether the *Johnson v. Jones* framework applies to absolute immunity in the same way as it applies to qualified immunity. We need not resolve that question today."

The First Circuit is expressly requesting further guidance from this Honorable Court and the instant case represents such an opportunity.

At the very minimum, the Circuit Court should have remanded the case to the District Court so that it could clarify its denial of Summary Judgment. In addition, we reiterate that the issue of appearing petitioners' absolute immunity, in accordance with state law, should have been certified to the Supreme Court of the Commonwealth of Puerto Rico. Alternatively, it is requested from this Honorable Court to apply the absolute immunity, conferred by the state statute, to the present case or qualified immunity as conferred by common law.

SUMMARY OF ARGUMENT

As we have already stated this is a Civil Rights action brought by Mr. Grand Cid Camilo-Robles (Mr. Camilo) under 42 USC Sections 1983 and 1988, as well as the

Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Mr. Camilo alleges that his constitutional or civil rights were violated by Police Officer Miguel Díaz-Martínez, as well as other defendants (among them Dr. Hoyos and Dr. Rivera), whom Mr. Camilo understands should be held liable for Officer Díaz-Martínez' actions. Dr. Hoyos and Dr. Rivera have never met or even seen plaintiff, Mr. Camilo.

Dr. Hoyos and Dr. Rivera are psychiatrists who worked for the Puerto Rico Police Department Medical Division, under the supervision of Dr. Lourdes González. It must be clarified that Dr. Hoyos and Dr. Rivera were the only psychiatrists at the time in the Medical Division, where the other physicians or health professionals, including the Director, Dr. Lourdes González, practiced other medical specialties.

To establish that the professional judgment of two physicians, declaring a police officer fit for duty, amounts to deliberate callousness and/or recklessness (which is the standard required by a Section 1983 plaintiff) would be detrimental to health professionals that work for the state and often must rely almost exclusively on their professional judgment. Such assertions against Dr. Hoyos and Dr. Rivera are nothing more than a lawyer's self-serving, undocumented and unsubstantiated assertions that should not be accepted by this Honorable Court. See *Nieves v. University of Puerto Rico*, 7 F.3d 270 (1st Cir. 1993), citing *Fragoso v. López*, supra.

In addition, Dr. Hoyos and Dr. Rivera's actions, if anything, could be at the most considered only as negligent and in that case they would be qualified immune as

we will discuss, infra. The causal relation that Mr. Camilo alleges is far too stretched to blame two physicians who found Díaz-Martínez physically fit. Even Mr. Camilo's expert witness on police affairs concurs that one may be fit from a medical point of view and still be a nasty person. Furthermore, Puerto Rican laws, case law, and public policy clearly establish the inexistence of a cause of action against them.

The Hon. United States District Court for the District of Puerto Rico expressed it clearly in *Frances Colón v. Ramírez*, 913 F. Supp. 112 (1996):

> "Plaintiff's attempts to characterize the defendant's conduct as something more sinister than medical malpractice are without avail. Section 1983 was not intended to provide redress for routine medical malpractice cases involving state doctors. Plaintiff's claim under Puerto Rico law cannot prosper because the defendant doctors are immune from suit . . . "

REASONS FOR GRANTING THE WRIT

A. PROCEDURAL BACKGROUND

After filing the original Complaint, on or around June 3, 1996, plaintiff filed an Amended Complaint, which was answered by Dr. Hoyos and Dr. Rivera on August 28, 1996.

Defendants requested the Hon. District Court to extend the time for discovery purposes as well as the cut-off date for dispositive motions. Said request was denied. Therefore, on December 2, 1996, Dr. Hoyos and Dr. Rivera

filed a "Motion for Summary Judgment and Memorandum of Law in Support Thereof", and a "Statement of Uncontested Facts".

Plaintiff, Mr. Camilo, on or around January 21st, 1997, filed an "Opposition to Motion for Summary Judgment by Defendants Hoyos and Rivera", "Motion for Partial Summary Judgment on Liability with Respect to Defendants Hoyos and Rivera-González", and "Plaintiff's Rule 311 Statement in Opposition to Request for Summary Judgment by Defendants Hoyos and Rivera-González and in Support of Plaintiff's Summary Judgment Request".

On January 28, 1997, Dr. Hoyos and Dr. Rivera filed a "Motion Requesting an Order to Compel Plaintiff to Notify Exhibits to his Rule 311 Statement and Other Extremes", which requested leave to reply to plaintiff's opposition. Mr. Camilo never opposed said request. Therefore, on March 4, 1997, appearing petitioners filed a "Motion Reiterating Co-Defendants Dr. Guillermo J. Hoyos-Precssas and Dr. Héctor O. Rivera González Request for Leave to File Reply to Plaintiff's Opposition to Summary Judgment", "Reply to Plaintiff's Opposition to Motion for Summary Judgment by Defendants Dr. Guillermo J. Hoyos and Dr. Héctor O. Rivera-González and Memorandum of Law in Support", and "Answer to Plaintiff's Motion for Partial Summary Judgment on Liability with Respect to Defendants Hoyos and Rivera-González". Appearing petitioners reply was unopposed by Mr. Camilo, and on August 26, 1997 an Order was issued granting the filing of said reply. The Honorable

District Court denied Mr. Camilo's request for Summary Judgment against Dr. Hoyos and Dr. Rivera.

B. ARGUMENT

This case presents an important question of law regarding immunity from suit at a pretrial stage vis-a-vis adjudication on the merits.

As herein previously discussed under the "Statement of the Case", Dr. Hoyos and Dr. Rivera are psychiatrists who worked for the Puerto Rico Police Department's Medical Division, who performed psychiatric evaluations of police officers and civilian personnel who work for the Police Department. Said psychiatric evaluations were performed when the person to be evaluated was referred to them by their supervisor or the supervisor of the person to be evaluated.

Mr. Camilo brought this action against Dr. Hoyos and Dr. Rivera (among other defendants) alleging that the psychiatric evaluations of Police Officer Miguel Díaz-Martínez performed by them were improper to such extent that they amounted to recklessness, deliberate indifference or callous disregard, constituting a violation of plaintiff's constitutional rights. According to plaintiff's allegations, Officer Díaz-Martínez directly deprived him of his rights and that said violation was propitiated in part by Dr. Hoyos and Dr. Rivera's psychiatric evaluations of Miguel Díaz-Martínez. It is uncontested that Dr. Hoyos and Dr. Rivera did not participate in the events or incident where Mr. Camilo alleges his constitutional rights were violated. In fact, Dr. Hoyos and Dr. Rivera have never met or seen Mr. Camilo.

Dr. Hoyos and Dr. Rivera's workplace, when rendering services for the Police Department, was at the Police Medical Office which is located at Puerto Rico Police Department's General Headquarters. (See FIRST clause of Appendix 68 and Appendix 76). All services rendered by both Dr. Hoyos and Dr. Rivera for the Police Department were professional services related to the field of psychiatry. It was contractually agreed by the Police and the physicians that: "**The control of cases and services, shall be rendered and determined by and in conformity with the need which THE POLICE have for same.**" See last paragraph of FIRST clause, Appendix 79 and Appendix 71.

Dr. Hoyos and Dr. Rivera's contract provided that each would work a maximum of one hundred (100) hours per month, at the rate of fifty dollars ($50.00) per hour, and if their work schedule would exceed one hundred hours per month, it would require the approval of the Police Superintendent or that of an authorized representative. See THIRD and FOURTH clauses of both contracts (Appendix 71 and Appendix 79). Their supervisor was Dr. Lourdes González.

Being the only two psychiatrists in the Police Medical Division, it was also contractually agreed by the psychiatrists and the Police Department that their services could not be delegated. See FOURTEENTH clause of both contracts (Appendix 74 and Appendix 82).

The EIGHTEENTH clause of their contracts with the Police Department (Appendix 74 and Appendix 83), stated that Dr. Hoyos and Dr. Rivera were to be covered by a relief, discharge or hold harmless from liability in

accordance with Puerto Rico's Supreme Court ruling on *Rafael Flores Román v. José Ramos*, 127 DPR 601 (1990) (Appendix 58), based on Puerto Rico's Act No. 55 of July 18, 1978, as amended, 26 LPRA Sec. 4105, Appendix 52 (incorrectly cited in the contracts as Section 5105).

Puerto Rico's Supreme Court interpreted Section 4105 in *Lind-Rodríguez v. Commonwealth*, 112 DPR 67 (1982), Appendix 54 and concluded that this Article not only applied to those doctors who worked exclusively for the Commonwealth, but in addition, to those doctors who maintained a private practice while working for the government.

The *Flores-Román* decision, supra, dealt with a physician under a contract with a government agency. It established that in order to grant immunity from suit under said circumstances, it must be determined if the physician performed the functions of an employee for the agency and if in reality he had the responsibilities assigned to a position within the administrative structure or if the degree of control that the employer had over his work is analogous to that of an employee.

As stated in *Rivera v. Hospital Universitario*, 762 F. Supp. 15 (DPR 1991):

> "The most important criteria in the determination of an employee status, vel non, is the control the employer may have over the work performed, regardless of whether or not said control is exercised. It is the existence of the right or authority to so intervene or control on the part of the employer or principal that makes the other person an employee and not an independent contractor."

In the present case, as in *Rivera*, supra, their contracts reveal that the physicians were paid on a salary basis and were required to fill out time sheets in order to be compensated. They were not paid on the basis of how many patients they evaluated each day, nor did they own the medical equipment which they utilized, or contribute towards the payment of rent or utilities. None of the physicians' private practice patients were seen at the Police Medical Office. They could examine a police officer only when referred to them by the Police Department or their supervisor.

It was established in *Rivera v. Hospital Universitario*, supra, that:

> "Although these doctors in actuality were essentially free from direct supervision, it should be noted that independent judgment is inherent to the practice of medicine. Thus, not every medical doctor is an independent contractor merely because of the freedom from direct supervision which their profession entails".

In the present case as in *Ahern v. O'Donnel*, 109 F.3d 809 (1st Cir. 1997), state law clearly grants immunity from civil suit to physicians. Therefore, since Dr. Hoyos and Dr. Rivera acted in accordance with the aforementioned statute (26 LPRA Sec. 4105), they are entitled to immunity.

Even in cases where the state statute is not as clear as in the present case, the First Circuit has reasoned that individuals under contract with the government, are entitled to raise the qualified immunity defense because they are the functional equivalents of public officials, see *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992).

Clearly the Commonwealth of Puerto Rico's policy on immunity from suit for physicians performing professional duties for a government agency, applies to the present case. At most Dr. Hoyos and Dr. Rivera's psychiatric evaluations of Miguel Díaz-Martínez could be regarded as negligent (which we deny) and therefore, no cause of action would arise under 42 USC Section 1983. The two essential elements of a Section 1983 claim are: (1) conduct committed by a person acting under color of state law; and (2) deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States. See *Frances Colón v. Ramírez*, 913 F. Supp. 112 (DPR 1996), which also states:

> "a section 1983 plaintiff who alleges failure to adequately safeguard his well-being must show that the State [or a State actor] affirmatively acted to restrain his personal liberty and that such action is responsible for his state of helplessness in order to make out a substantive due process claim . . .
>
> * * *
>
> . . . However unfortunate the outcome of defendants' alleged acts, we are not speaking here of conduct so egregious that it offends even hardened sensibilities.
>
> The United States Supreme Court has long insisted that not every tort committed by a state actor is a constitutional violation. The United States Constitution and traditional tort law quite simply do not address the same concerns. Section 1983 was originally enacted as § 1 of the Ku Klux Act of April 20, 1871, entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United

> States, and for other Purposes." The Due Process Clause of the Fourteenth Amendment protects the individual against arbitrary state action and prevent governmental power from being used for purposes of oppression. Section 1983 was enacted during a period of extreme civil unrest and lawlessness in the South. State agents afforded no effective redress and became passive or active implements of the prevailing oppression. Section 1983 was enacted to eradicate such oppression.
>
> Since the focus of the Due Process Clause is prevention of the arbitrary and oppressive use of state power, it historically has been applied to "deliberate decisions of government officials to deprive a person of life, liberty, or property." Negligence, the touchstone of tort law, "suggests no more than a failure to measure up to the conduct of a reasonable person" and is "quite remote from the concerns just discussed." The defendant doctors in the instant case deliberately decided not to deliver plaintiff by caesarean section. However their deliberation centered on selecting a medical procedure, not on depriving plaintiff of his constitutional rights. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.
>
> Since plaintiff has failed to identify a protected liberty interest and has failed to show that defendants acted with the requisite degree of culpability, his Section 1983 claim must be dismissed as to all defendants. (Citations omitted.)

The Honorable Court of Appeals for the First Circuit has stated:

> "We have made it crystal clear that, in opposing summary judgment, a litigant may not rest upon mere allegations in, say, an unverified complaint or lawyer's brief, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact . . .
>
> . . . after all, proffers that depend not on verified facts but on arrant speculation, optimistic surmise, or farfetched inference cannot forestall summary judgment." *Fragoso v. López*, supra, citing *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991).

See also *Nieves v. University of Puerto Rico*, supra, where plaintiff's counsel presented data to oppose a request for summary judgment in the form of a lawyer's assertions, rather than in the form required by Fed. Rule 56(e) of Civil Procedure, and the First Circuit expressed that plaintiff's undocumented and unsubstantiated assertions were much less compelling and probative than plaintiff's counsel claimed.

As previously discussed, a Section 1983 plaintiff must prove that the defendant acted intentionally or with an analogous state of mind amounting to deliberate indifference to the deprivation of the plaintiff's constitutional rights.

Dr. Hoyos and Dr. Rivera are qualified immune. Government officials performing discretionary functions generally are shielded from liability for civil damages, so long as their conduct does not violate clearly established rights of which a reasonable person would have known, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at the time an action occurred was not clearly established, an official could not reasonably be expected to anticipate subsequent legal development, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." See *Harlow*, supra, at p. 818.

Furthermore, Mr. Camilo cannot contradict the impression or opinion of his expert witnesses, Mr. Lou Reiter and Dr. Víctor Lladó. Mr. Reiter, plaintiff's expert witness on police affairs, concurs with our view in determining that a medical psychiatric decision, as to an officer's fitness for carrying a weapon, can be only one of the elements to be considered in an administrative decision. Said decision rests ultimately on the Police Superintendent or an authorized representative.[3]

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[3] Per Dr. Hoyos and Dr. Rivera's request, prior to the Camilo incident, Puerto Rico's Police Department Legal Division rendered a report regarding who has the final word regarding the rearming (reissuing a weapon) of a police officer. It was determined that such responsibility relies ultimately on the Police Superintendent or his authorized representative after taking into consideration several factors, the medical evaluation being only one of such factors.

Dr. Víctor Lladó, a licensed psychiatrist, retained by plaintiff to prove his alleged damages and not for determining if Dr. Hoyos and Dr. Rivera were negligent or "grossly negligent", has also stated:

> "Medical and/or psychiatric consultants are usually merely advisors within institutional-occupational psychiatry settings, and they don't have direct administrative responsibility for decision making concerning issues like the employment status of an individual or duty changes. That type of responsibility almost always rests with the employer."

Dr. Lladó has also determined on an expert witness report for another case, *Díaz v. Díaz-Martínez*, Civil No. 04-2184 (HL), in which he was retained by the same plaintiff attorney, Mr. Peter Berkowitz, and involves mainly the same defendants (including Dr. Hoyos and Dr. Rivera whose request for Summary Judgment was granted:

> "From the psychiatric documentary evidence reviewed, in my opinion, there is a very likely probability, that policeman Díaz-Martínez has never suffered from any serious mental illness or psychiatric condition, and that he has rather simply displayed repetitive antisocial and impulsive-aggressive behavior of a voluntary and deliberate nature."

Dr. Lladó further agreed that herein appellants Dr. Hoyos and Dr. Rivera's determination was correct regarding no findings of psychiatric conditions on Díaz-Martínez, Appendix 84-87.

On the other hand, the psychiatric evaluations of Díaz-Martínez performed by Dr. Hoyos and Dr. Rivera took place on June 30, 1993; August 27, 1993; and February 28, 1994. The incident that took place between Mr. Camilo and Díaz-Martínez occurred on May 13, 1994. Even assuming, which we deny, that the psychiatrists are not qualified immune from liability or that Puerto Rico's policy of inexistence of cause of action against health professional working for the state does not apply, the single incident between Mr. Camilo and Díaz-Martínez is far from being the proximate result of the psychiatric evaluations. Such incident is too remote a consequence to hold Dr. Hoyos and Dr. Rivera responsible under federal civil rights law, see *Martínez v. California*, 444 U.S. 277 (1980). Furthermore, even assuming so, it would be a case of tort law under Puerto Rico's Civil Code, Article 1802, 31 LPRA Sec. 5141, Appendix 53.

> "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity."

When federal claims are dismissed before trial, the state law claims should be dismissed, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Figueroa Ruiz v. Alegría*, 896 F.2d 645, 650 (1st Cir. 1995); *Rodríguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995).

In addition, if the remedy available would be a tort action under state law, 26 LPRA Sec. 4105 would apply and "the course the state court would take is reasonably

clear" (that there is no cause of action), *Nieves v. University of Puerto Rico*, supra.

CONCLUSION

We respectfully submit to this Honorable Court that in the present case there are no genuine issues as to any material fact that would preclude entry of a summary judgment. Dr. Hoyos and Dr. Rivera are immune from suit, both under the legal doctrine of qualified immunity and under Puerto Rico's legal dispositions, case law, and public policy which grant them absolute immunity. Mr. Camilo has no valid cause of action against Dr. Hoyos and Dr. Rivera under 42 USC Sec. 1983, 1988, nor the Fourth, Fifth and/or the Fourteenth Amendments to the United States Constitution. The psychiatric evaluations performed on Miguel Díaz-Martínez were only part of Dr. Hoyos and Dr. Rivera's professional judgment which in no way could amount to the standards required to prove a constitutional violation. At worst, the actions of Dr. Hoyos and Dr. Rivera would only constitute negligence, and even under that assumption no cause of action exists, see 26 LPRA Sec. 4105, supra.

> "Plaintiff's attempts to characterize the defendant's conduct as something more sinister than medical malpractice are without avail. Section 1983 was not intended to provide redress for routine medical malpractice cases involving state doctors. Plaintiff's claim under Puerto Rico law cannot prosper because the defendant doctors are immune from suit . . . " *Frances Colón v. Ramírez*, 913 F. Supp. 112 (1996).

Furthermore, Dr. Hoyos and Dr. Rivera entered into a contract with the Puerto Rico Police Department which leaves no doubt as to the intentions of the contracting parties, that is, for the Department to discharge or relieve them from all liability when performing their functions for the Police Department. The evaluation of plaintiff falls under this contract. The complaint filed against Dr. Hoyos and Dr. Rivera should be dismissed. Therefore, the petitioners respectfully submit that this Honorable Court grant the writ in the present case or alternatively request a certification from the Supreme Court of Puerto Rico regarding the immunity from suit health professionals have while working for the government.

Respectfully submitted,

MARTINEZ ALVAREZ, MENENDEZ
CORTADA & LEFRANC ROMERO, PSC

RAMON VAZQUEZ
Centro de Seguros Bldg., Suite 407
701 Ponce de León Ave., Miramar
Santurce, Puerto Rico 00907-3286
Tel. (787) 721-1140
Fax. (787) 721-7866
Counsel for Petitioners

APPENDIX

Grancid CAMILO-ROBLES, Plaintiff, Appellee,

v.

Dr. Guillermo HOYOS and Dr. Hector O. Rivera-Gonzalez, Defendants, Appellants.

Grancid CAMILO-ROBLES, Plaintiff, Appellee,

v.

Pedro A. TOLEDO-DAVILA, Defendant, Appellant.

Grancid CAMILO-ROBLES, Plaintiff, Appellee,

v.

Gilberto DIAZ-PAGAN, Defendant, Appellant.

Grancid CAMILO-ROBLES, Plaintiff, Appellee,

v.

Pablo SANTIAGO-GONZALEZ, Defendant, Appellant.

Nos. 97-2260 to 97-2262 and 97-2264.

United States Court of Appeals,
First Circuit.

Heard Feb. 25, 1998.

Decided June 29, 1998.

Roberto Lefranc Romero, with whom Martinez Alvarez, Menendez Cortada & Lefranc Romero was on brief, for appellants Hoyos and Rivera-Gonzalez.

John F. Nevares, with whom Ayleen Charles, Lizzie Portela, and Smith & Nevares were on brief, for appellant Toledo-Davila.

Orlando Duran-Medero, with whom Ricardo R. Rodriguez Padilla Law Offices was on brief, for appellant Diaz-Pagan.

Roberto Santana Aparicio, with whom Marisol Vega Coputo and Del Toro & Santana were on brief, for appellant Santiago-Gonzalez.

Judith Berkan, with whom Peter Berkowitz was on brief, for appellee.

Before SELYA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and STAHL, Circuit Judge.

SELYA, Circuit Judge.

After suffering indignities at the hands of an unstable police officer, plaintiff-appellee Grancid Camilo-Robles sued an array of defendants under 42 U.S.C. § 1983 (1994).[1] In due season, five such defendants, appellants here, moved for summary judgment on the ground of qualified immunity. The district court rejected their motions (in some instances without waiting for an opposition). Although the timing of the district court's ruling and the lack of any authoritative insight into the court's reasoning complicate our task, we affirm.

I. BACKGROUND

Parking privileges denote special status in our motorized society, and emotions often run high when a

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[1] The record reflects considerable ambivalence as to the correct spelling of the plaintiff's Christian name. We resolve this uncertainty by emulating the usage employed by Camilo-Robles in his appellate brief.

parking space is at stake. This case vividly illustrates that verity.

On May 13, 1994, Miguel Diaz-Martinez, a police officer assigned to the Bayamon Criminal Investigation Corps (CIC), sought to park in an area reserved for judges at the Bayamon Judicial Center. Camilo-Robles, a security guard sworn to protect that hallowed ground, told Diaz-Martinez that he could not park there. In response to this perceived affront, Diaz-Martinez placed his hand on his gun, arrested Camilo-Robles, handcuffed him, shoved the prisoner into his (Diaz-Martinez's) police cruiser, and drove to the station house (pausing to punch Camilo-Robles in the stomach and slap him in the face). Upon their arrival, Diaz-Martinez forced the plaintiff to remove his belt and shoes and placed him in a cell with other detainees. Cooler heads prevailed, and Diaz-Martinez's prey was released, uncharged, some three hours later.

Camilo-Robles sued Gilberto Diaz-Pagan (director of the Bayamon CIC), Pablo Santiago-Gonzalez (Bayamon area commander), and Pedro A. Toledo-Davila (superintendent of police). In addition to these high-ranking police officials, Camilo-Robles named a host of other defendants including inter alia two psychiatrists who worked for the police department, Drs. Guillermo Hoyos and Hector O. Rivera-Gonzalez. Invoking section 1983, Camilo-Robles alleged that these five named defendants (collectively, "the appellants") had deprived him of his civil rights by their deliberate indifference in carrying out their supervisory responsibilities (with the result that Diaz-Martinez, a demonstrably unstable officer, was allowed to remain on active duty).

The district court issued its scheduling order on February 21, 1996. In December of that year, the appellants filed summary judgment motions. Camilo-Robles responded on the merits to the psychiatrists' summary judgment motion, but served a cross-motion seeking additional time in which to oppose the police officials' motions, *see* Fed.R.Civ.P. 56(f), explaining that they had stonewalled during pretrial discovery. The district court granted this cross-motion without limit of time and referred all pending discovery matters to a magistrate judge. Lassitude set in, and the magistrate made no rulings until August 26, 1997. Two days later, the district court denied the appellants' summary judgment motions in a curt, two-page order. These appeals followed.

II. A CAREER TO MAKE ST. SEBASTIAN WEEP

Because the allegations of liability and the defenses thereto hinge upon what actions the various defendants took (or should have taken) in light of Diaz-Martinez's flagitious history of violence, the latter's career is of great relevance. We extract the facts from the summary judgment record, resolving all conflicts in favor of the plaintiff. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir.1990).

Diaz-Martinez joined the police force as a cadet in March 1984. That December, he was suspended for an assault. Despite the suspension, he became a regular officer and served as such for the next five years. His record reflects numerous disciplinary infractions involving violent and/or threatening behavior – we count at least

eighteen – many of which entailed unwarranted brandishing of his weapon. The denouement occurred in August 1989 when, after assaulting his wife, Diaz-Martinez entered the Catano police station, seized a shotgun, and held several gendarmes (including the acting police superintendent) hostage for several hours.

Subsequent to this bizarre display, Diaz-Martinez was committed involuntarily to a psychiatric hospital and diagnosed as schizophrenic. The hospital discharged him and three months later a police psychiatrist, Dr. Pagan-Davis, recommended that he be separated from the force and given a civilian position. The police department suspended Diaz-Martinez in 1990 and formally expelled him in 1991.

Justice sometimes moves in mysterious ways. Diaz-Martinez successfully appealed his expulsion and the police department reinstated him in May 1993. While on desk duty, he assaulted a civilian. Nevertheless, Drs. Hoyos and Rivera-Gonzalez found Diaz-Martinez free from mental illness and fit for active duty (with no restrictions) when they examined him in August. The department promptly rearmed him and assigned him to work in a high-tension neighborhood. On September 8, 1993 (the day following his return to active duty), Diaz-Martinez engaged in an altercation with two unarmed, law-abiding neighborhood residents. In the course of this fracas, he shot both of them, wounding one and killing the other. *See Diaz v. Diaz Martinez*, 112 F.3d 1, 2 (1st Cir.1997) (summarizing the facts of that episode). The police department immediately confiscated his weapon.

After a self-imposed exile, Diaz-Martinez returned to desk duty in November 1993. On January 20, 1994, while still unarmed, Diaz-Martinez threatened to kill a fellow officer at the Bayamon Radio Center. Six days later, he was transferred to the Bayamon CIC. On February 28, 1994, Drs. Hoyos and Rivera-Gonzalez again examined Diaz-Martinez and again declared him ready for unrestricted active duty and fit to carry a weapon. The police department rearmed him forthwith.

The incident that sparked this suit occurred in May of 1994. The police department again expelled Diaz-Martinez that August. He eventually pled guilty to voluntary manslaughter in connection with the September 1993 shootings and was sentenced to serve a prison term.[2]

III. THE LEGAL LANDSCAPE

Before tackling the vagaries of each defendant's appeal, we first must map the crossroads at which the qualified immunity doctrine and principles of supervisory liability under section 1983 intersect. We then discuss pertinent questions of appellate jurisdiction and pause to note the somewhat tentative nature of orders denying summary judgment in the qualified immunity context.

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[2] We have merely skimmed the surface of Diaz-Martinez's checkered career. As noted above, he compiled an unenviable string of administrative complaints in a relatively brief span. Moreover, in January 1994, an internal police investigation (the Calderon Report) revealed that he had committed many other acts of violence and threatened violence that did not culminate in administrative action.

A. Qualified Immunity and Supervisory Liability.

Federal law provides a cause of action when an individual, acting under color of state law, deprives a person of federally assured rights. *See* 42 U.S.C. § 1983. Public officials who stand accused of civil rights violations under section 1983 nonetheless can avoid liability for money damages by showing either that they did not violate a right clearly established under federal law or that they acted with objective legal reasonableness.[3] *See Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Buenrostro v. Collazo*, 973 F.2d 39, 42 (1st Cir.1992).

The Supreme Court has emphasized that a section 1983 plaintiff must allege a violation of a clearly established right secured either by the Constitution or by some other federal law. *See County of Sacramento v. Lewis*, ___ U.S. ___, ___ n. 5, 118 S.Ct. 1708, 1714 n. 5, 140 L.Ed.2d 1043 (1998). Here, the plaintiff vaults this hurdle with room to spare. The right to be free from unreasonable seizure (and, by extension, unjustified arrest and detention) is clearly established in the jurisprudence of the Fourteenth Amendment (through which the Fourth Amendment constrains state action). The right to due process of law (and, by extension, to be free from police

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[3] For this purpose, a right is "clearly established" when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

brutality) is likewise clearly established under the Fourteenth Amendment (through which the Fifth Amendment constrains state action).

We have not had occasion to address the question whether, to be liable under section 1983, a supervisor must have violated an independent, "clearly established" right, or whether a supervisor may be liable based only on his proximity to a subordinate's violation of a "clearly established" right. Other circuits, however, have addressed this interplay between the "clearly established" requirement and supervisory liability. We follow their lead and adopt an approach that comports with the core principle of qualified immunity by protecting supervisory officials from suit when they could not reasonably anticipate liability.

When a supervisor seeks qualified immunity in a section 1983 action, the "clearly established" prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 (5th Cir.1994); *Shaw v. Stroud*, 13 F.3d 791, 801 (4th Cir.1994). In other words, for a supervisor to be liable there must be a bifurcated "clearly established" inquiry – one branch probing the underlying violation, and the other probing the supervisor's potential liability.

Here, both elements are satisfied. We already have noted that the plaintiff's clearly established rights were violated, *see supra* Part III(A), and it is equally well settled

that a deliberately indifferent police supervisor may be held liable for the constitutional violations of his subordinates. *See Diaz*, 112 F.3d at 4.

The question, then, reduces to the test of objective legal reasonableness. This test does not serve as a proxy for liability, because even state actors who commit constitutional violations may be entitled to qualified immunity. *See, e.g., Ringuette v. City of Fall River*, 146 F.3d 1, 5 (1st Cir.1998); *Brennan v. Hendrigan*, 888 F.2d 189, 194 (1st Cir.1989). Instead, the test's utility is restricted to the qualified immunity inquiry. In that milieu, the test provides a method for determining whether, in relation to a clearly established right, a defendant's conduct was (or was not) reasonable. Withal, objective legal reasonableness is a concept that grew up in the prototypical section 1983 context – a context in which a state actor ("A") inflicts injury directly on a victim ("V") in derogation of V's constitutionally-protected rights. Where the context shifts – as where A is not a direct actor (i.e., he himself did not perpetrate the seizure, detention, or assault of which V complains), but, rather, stands accused of permitting a third person ("B"), also a state actor, to violate V's rights – the test remains intact, but its focus shifts. In this tri-cornered situation, objective legal reasonableness (and, hence, qualified immunity) necessarily depends upon the relationship between A's acts or omissions and B's conduct.

This brings us to the doctrine of supervisory liability, which holds that a supervisor (defined loosely to encompass a wide range of officials who are themselves removed from the perpetration of the rights-violating

behavior) may be liable under section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Notice is a salient consideration in determining the existence of supervisory liability. *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93 (1st Cir.1994) (treating as "[a]n important factor . . . whether [the supervisor] was put on notice of behavior which was likely to result in the violation of . . . constitutional rights"). Nonetheless, supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he "may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir.1994).

To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. *See Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir.1992). This formulation correctly implies that deliberate indifference alone does not equate with supervisory liability; a suitor also must show causation. *See Maldonado-Denis*, 23 F.3d at 582 (explaining that the supervisor must have "had the power and authority to alleviate [the violation]"). In other words, the plaintiff must "affirmatively connect the supervisor's conduct to the subordinate's violative act or omission." *Id.* This affirmative connection need not take the form of knowing sanction, but may include tacit approval of, acquiescence

in, or purposeful disregard of, rights-violating conduct. *See id.*

This returns us to the point of our beginning: the relationship between qualified immunity and supervisory liability. By definition, a defendant who claims qualified immunity must do so either on the theory that the asserted right is not clearly established or on the theory that the conduct attributed to him satisfies the test of objective legal reasonableness. *See Harlow,* 457 U.S. at 819, 102 S.Ct. 2727. Because the constitutional rights and supervisory liability doctrine that underlie Camilo-Robles's claim are clearly established, the qualified immunity analysis here turns on whether, in the particular circumstances confronted by each appellant, that appellant should reasonably have understood that his conduct jeopardized these rights. *See Ringuette,* 146 F.3d at 5; *Berthiaume v. Caron,* 142 F.3d 12, 14-15 (1st Cir.1998).

The inquiry into qualified immunity is separate and distinct from the inquiry into the merits. Consequently, courts are well-advised to separate "qualified immunity" analysis from "merits" analysis whenever practicable. In some circumstances, however, these inquiries overlap. So it is here: the appellants stand accused of culpable conduct in a setting that requires an inquiry into deliberate indifference (which is customarily a merits-related topic).

Given this setting, discerning whether a particular appellant's behavior passes the context-specific test of objective legal reasonableness to some extent collapses the separate "qualified immunity" and "merits" inquiries

into a single analytic unit.[4] Such an approach is unusual, but we occasionally have engaged in precisely this sort of merits-centric analysis in the course of deciding questions of qualified immunity. *See, e.g., Morales v. Ramirez*, 906 F.2d 784, 787 (1st Cir.1990) (explaining "that, in certain cases, some aspect of the merits may be inexorably intertwined with the issue of qualified immunity") (citation and internal quotation marks omitted); *Amsden v. Moran*, 904 F.2d 748, 753-58 (1st Cir.1990) (examining the substance of the plaintiff's due process claims to determine the defendants' eligibility for qualified immunity).

We weave these strands together into a thread that binds these appeals. The plaintiff alleges a violation of clearly established constitutional rights and asserts that several defendants bear supervisory liability for that violation. Responding to these allegations, each defendant claims qualified immunity and, because both the rights in question and each defendant's susceptibility to supervisory liability are clearly established, these qualified immunity claims hinge on whether that defendant's conduct was objectively reasonable. Since our inquiry into

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[4] In one sense, this phenomenon is more apparent than real. Although the variables in the "qualified immunity" and "merits" equations may be the same, the standards to be applied to those variables differ substantially. Thus, rights-violating conduct that a factfinder could conclude supports a determination of liability nonetheless may fall within the wider band of objective legal reasonableness (and thus would support a judicial determination of qualified immunity). *See, e.g., Brennan*, 888 F.2d at 194.

objective legal reasonableness involves deliberate indifference, however, we are compelled to engage the merits to a greater extent than is usual.

B. Consideration Affecting Appellate Jurisdiction.

Were we reviewing a district court's grant of summary judgment based on qualified immunity, our course would be clear: we would determine de novo whether the affected defendant was entitled to a favorable judgment as a matter of law. Here, however, the summary judgment motions were denied, not granted, and this fact complicates our analysis. In the qualified immunity realm, the dividing line between appealable and non-appealable denials of summary judgment is blurred.

Cases are clear enough at the extremes. We know, for instance, that when a motion for summary judgment that asserts qualified immunity is rejected, the denial cannot ground an interlocutory appeal if the operative question is "whether or not the pretrial record sets forth a genuine issue of fact for trial." *Johnson v. Jones,* 515 U.S. 304, 320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Similarly, we know that the denial of such a motion is immediately appealable if the operative question is purely legal in nature. *See id.* at 319, 115 S.Ct. 2151. In fine, "a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand." *Stella v. Kelley,* 63 F.3d 71, 74 (1st Cir.1995); accord *Behrens v.*

Pelletier, 516 U.S. 299, 306, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996).

Determining the existence vel non of appellate jurisdiction in cases closer to the equator is more difficult. Some examples may be useful. In *Diaz*, we determined that we lacked jurisdiction to entertain an interlocutory appeal from a pretrial decision denying qualified immunity because the decision turned on the existence of a factual conflict or on what the lower court perceived to be a factual conflict. 112 F.3d at 4-5. This contrasts with situations in which the district court assumes a set of facts and decides, as a matter of law, that those facts will not support a qualified immunity defense – in which event jurisdiction exists to entertain an immediate appeal. *See Behrens*, 516 U.S. at 313, 116 S.Ct. 834.

If this were not complex enough, the district judge is not legally obliged to explain the basis on which a denial of summary judgment rests. *See Johnson*, 515 U.S. at 319, 115 S.Ct. 2151 (acknowledging that "[d]istrict judges may simply deny summary judgment motions without indicating their reasons for doing so"); *Domegan v. Fair*, 859 F.2d 1059, 1065-66 (1st Cir.1988) (similar). When the district court's order is unilluminating, the appellate court must fend for itself. Anticipating the dilemma that such an inscrutable order may pose in the qualified immunity context, the Court prophesied "that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 515 U.S. at 319, 115 S.Ct. 2151. Hence, we must perform the equivalent of an archeological [sic]

dig and endeavor to reconstruct the probable basis for the district court's decision.[5]

Here, the district court denied the appellants' motions for summary judgment before the plaintiff filed oppositions to several of those motions. As a result of this hastiness, the data before the court were limited – and limited further by the appellants' apparent intransigence in furnishing discovery.[6] Withal, the district court had before it a great deal of information from sources such as the psychiatrists' summary judgment papers, the plaintiff's opposition to the psychiatrists' motion, and evidentiary materials submitted by a former codefendant in connection with an earlier summary judgment motion. The court also had before it all the appellants' moving papers (which contain more than a smidgen of intramural fingerpointing). The court was at liberty to consult all these sources, and we, too, can consult them in endeavoring to determine whether the court below based its decision

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[5] Of course, if the court of appeals simply cannot decipher the lower court's decisional calculus, then it has the option of remanding for clarification. This option should be used sparingly, however, for interlocutory appeals sometimes serve as a delaying tactic in meritorious cases, and the remand alternative invariably promotes further delay. In this instance, we do not believe that remand is essential.

[6] Although the plaintiff's brief alludes to extra-record evidence that supposedly would have been brought to the district court's attention had that court acted more deliberately, we cannot consider this evidence. *See United States v. Kobrosky*, 711 F.2d 449, 457 (1st Cir.1983). Our task here is to examine the database that was before the district court when it ruled.

on contested facts as opposed to a quintessentially legal judgment.[7]

C. A Note of Caution.

Having performed the exercise described in Part III(B), supra, we conclude, for reasons made manifest in our subsequent discussion of the appellants' claims, that we have jurisdiction over all these appeals and that the lower court appropriately denied all four summary judgment motions. We note, however, that this endorsement of the district court's ruling has a somewhat tentative cast. We offer three pertinent observations.

First, our approach assumes, despite the awkwardness of the conceptual fit, that deliberate indifference cases are amenable to standard qualified immunity analysis – a proposition that logically may be debatable, but that nevertheless follows from the Supreme Court's broad pronouncements. *See, e.g., Harlow,* 457 U.S. at 819, 102 S.Ct. 2727. Second, a pretrial refusal to grant qualified immunity is only a way station in the travel of a case. When a defendant fails on a pretrial qualified immunity claim, he nonetheless can plead qualified immunity as an affirmative defense and resurrect the claim at trial. *See Ringuette,* 146 F.3d at 3-4; *King v. Macri,* 993 F.2d 294, 299

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[7] Although a district court must consider the information described in the parties' filings in compliance with a local rule such as D.R.R.Loc.R 311, and may choose to limit its consideration accordingly, the court can, if it so elects, mull any other evidence in the record. *See Little v. Cox's Supermarkets,* 71 F.3d 637, 641 (7th Cir.1995); *Stepanischen v. Merchants Despatch Trans. Co.,* 722 F.2d 922, 930 n. 2 (1st Cir.1983).

(2d Cir.1993); *Vazquez Rios v. Hernandez Colon*, 819 F.2d 319, 329 (1st Cir.1987). Third, notwithstanding a pretrial rejection of qualified immunity, the merits remain open.

IV. THE PSYCHIATRISTS

The plaintiff alleges that the psychiatrists, Drs. Hoyos and Rivera-Gonzalez, evaluated Diaz-Martinez on February 28, 1994, with complete indifference to the constitutional rights of others and recklessly declared him fit for duty and able to carry a weapon. The psychiatrists' joint summary judgment motion addressed this claim on two levels, positing that they enjoy (1) absolute immunity from suit under Puerto Rico law, and (2) qualified immunity from suit under federal law because their performance was objectively reasonable and, in any event, had no direct bearing on the decision to restore an armed Diaz-Martinez to active duty. We grapple with these asseverations in sequence.

A. Absolute Immunity.

A district court's refusal to grant summary judgment on an absolute immunity claim is, generally speaking, within the scope of our appellate jurisdiction on interlocutory appeal.[8] *See Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 21 (1st Cir.1992). In this instance, it invokes

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[8] The Supreme Court has not yet decided whether the *Johnson v. Jones* framework applies to absolute immunity in the same way as it applies to qualified immunity. We need not resolve that question today.

the Puerto Rico Medico-Hospital Professional Liability Insurance Act, which provides in pertinent part:

> No health service professional may be included as a defendant in a civil suit for damages due to malpractice caused in the performance of his/her profession while said health service professional acts in compliance with his duties and functions as an employee of the Commonwealth of Puerto Rico, its dependencies, instrumentalities and municipalities.

P.R.Laws Ann. tit. 26, § 4105 (1994). The psychiatrists contend that this statute immunizes them because they examined Diaz-Martinez pursuant to the terms of a contract purporting to free them from liability under section 4105 (incorrectly identified as section 5105). We do not agree.

In the first place, the statute on its face applies to "employees." The contract states that the psychiatrists are independent contractors, not employees, and the record at the very least raises unanswered factual questions anent the statute's applicability. *See, e.g., Flores Roman v. Ramos Gonzalez,* 127 P.R. Dec. 601, 608-09 (P.R.1990) (examining the relevant contract to determine whether a given defendant is an employee or independent contractor); *see also Nieves v. University of P.R.,* 7 F.3d 270, 273 (1st Cir.1993) (discussing section 4105).

In the second place, even if section 4105 applies, it at most gives government-employed physicians immunity from claims brought under Puerto Rico law. A state-conferred immunity cannot shield a state actor from liability under section 1983. *See Martinez v. California,* 444 U.S. 277, 284 n. 8, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980)

("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law.") (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir.1973)). Indeed, a regime that allowed a state immunity defense to trump the imposition of liability under section 1983 would emasculate the federal statute. *See id.* We therefore reject the proposition that absolute immunity entitled the psychiatrists to summary judgment.[9]

B. Qualified Immunity.

Before confronting the psychiatrists' qualified immunity defense, we make a preliminary point. The psychiatrists are private practitioners, not government employees in the traditional sense. Consequently, one might wonder whether they could be liable at all under section 1983, or, if so; whether they would be entitled to qualified immunity even on a "best case" scenario. The answer to both questions is in the affirmative.

A private party's conduct is attributable to the state if the state "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." *Barrios-Velazquez v. Asociacion De Empleados Del*

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[9] We do not pass upon the effectiveness vel non of section 4105 in regard to the plaintiff's pendent claims under Puerto Rico law. *See Morales*, 906 F.2d at 787 n. 2 ("It is perfectly obvious that if pendent appellate jurisdiction is available at all [on an interlocutory qualified immunity appeal] – a matter on which we intimate no view – the doctrine's use is discretionary.").

Estado Libre Asociado, 84 F.3d 487, 494 (1st Cir.1996) (citation and internal quotation marks omitted; alteration in the original). Here, the psychiatrists acted under contract with the police department to assist in a necessary departmental function: the evaluation of officers. Hence, the psychiatrists, virtually by their own admission (*see supra* Part IV(A)), are for purposes of this case state actors performing in concert with the department. As such, they are both subject to suit under section 1983 and eligible for the balm of qualified immunity. *See Rodriques v. Furtado*, 950 F.2d 805, 814 (1st Cir.1991) (extending qualified immunity to a physician who agreed to assist the police in a body cavity search).

That said, the psychiatrists' pretrial case for qualified immunity lacks force. First, perscrutation of the record discloses uncontested facts sufficient to permit us to exercise jurisdiction over their appeal. Second, those facts, construed favorably to Camilo-Robles, adequately ground a tripartite conclusion (1) that Diaz-Martinez posed an unusually serious risk of harm, (2) that the psychiatrists had actual knowledge of the risk, and (3) that they failed to take readily apparent steps to alleviate that risk. Third, the assumed set of facts presented here reveals a reckless disregard for the rights of others that outstrips any band of protection afforded by the doctrine of qualified immunity in cases of deliberately indifferent conduct.

We see no need to differentiate between the two psychiatrists for present purposes; after all, they themselves have abjured such a course and presented a united front both below and on appeal. By like token, it seems

unnecessary to rehearse all the facts that contribute to our conclusions. Instead, we offer a sampling.

- The psychiatrists approached the February 1994 evaluation with abundant foreknowledge of Diaz-Martinez's case, gleaned from their August 1993 evaluation of him and their ensuing certification that he was fit for active duty at that time.

- On September 1, 1993, a few days after they issued the August 1993 certification, the psychiatrists received a psychologist's report (the Sedra Report), dated July 14, 1993, which noted that Diaz-Martinez denied reality, that he was immature, impulsive, and anxious, and that "his tension level could make him . . . act[ ] out." Dr. Sedra later described this last observation as equivalent to saying that Diaz-Martinez "could explode at any time." Despite receiving this report, the psychiatrists did not revisit their original certification of Diaz-Martinez as fit for duty, and seem to have ignored the Sedra Report during the February 1994 examination.

- On September 8, 1993, Diaz-Martinez shot two innocent civilians, thus confirming Dr. Sedra's warnings. Still, the psychiatrists (both of whom knew of that incident) nonetheless recertified Diaz-Martinez for rearming and active duty in February 1994 without an intervening psychological evaluation.

- To administer their government contract, the psychiatrists set up a system whereby each doctor would independently interview each referred officer, thus ensuring two detached opinions. Although the psychiatrists knew Diaz-Martinez's stunning history of violence, they

nonetheless deviated from this protocol in their February 1994 evaluation. Indeed, their entire examination consisted of one joint interview.

- After conducting their joint interview, the psychiatrists declared Diaz-Martinez "fit to engage in all of the duties inherent to a law enforcement agent . . . (including the use of a regulation weapon)," without carrying out any further investigation.

- By his own admission, Dr. Hoyos neglected to read the Calderon Report (which detailed numerous instances of Diaz-Martinez's aberrant behavior) before signing off on Diaz-Martinez's status. Dr. Rivera-Gonzalez, who did read the Calderon Report, brushed it aside as insufficient to warrant further investigation.

- There is no evidence to suggest that the psychiatrists requested or consulted Diaz-Martinez's current complaint history before they gave him a clean bill of health in February 1994.

The presence of these essentially uncontested facts strongly suggests that the district court denied the psychiatrists' motion for summary judgment as a matter of law. We therefore have appellate jurisdiction. *See Behrens*, 516 U.S. at 313, 116 S.Ct. 834.

Exercising that jurisdiction and reviewing the district court's decision *de novo*, we believe that under at least one plausible scenario depicted by these assumed facts – in which the psychiatrists did not comply with their own evaluation protocol, failed to credit or take seriously the psychologist's report, made only a cursory effort to gather relevant data, and virtually ignored the information that did come to their attention – the psychiatrists

carried out an objectively unreasonable course of conduct.

Of course, the psychiatrists have a fallback position: they maintain that their conduct (whether or not objectively reasonable) did not cause harm to Camilo-Robles because they functioned merely as advisors and did not themselves make the decision to return a fully armed Diaz-Martinez to the streets. This contention is better suited to a discussion of the merits, but to the extent that some causal connection is necessary to find that a state actor has failed the test of objective legal reasonableness, that nexus exists here.

To be sure, the psychiatrists did not have official authority to rearm Diaz-Martinez and restore him to active duty. Nonetheless, the summary judgment record makes it pellucid that the psychiatrists knew that their certification of Diaz-Martinez would, in Dr. Hoyos's phrase, "most probably" result in the officer's immediate rearming and return to active duty – as it had in every other previous instance. The police superintendent likewise attested to the significance of the psychiatrists' role. According to him, once the examining psychiatrist "certifies in writing that [an officer] is authorized to bear arms . . . we proceed to give back the weapon." Then, too, the director of the Bayamon CIC stated that the psychiatrists – not the police hierarchy – made the decision to rearm Diaz-Martinez. Finally, the record permits a reasonable inference that the psychiatrists eschewed easily accessible steps to forestall the rearming of Diaz-Martinez and instead certified his fitness for unrestricted active duty. Because this is an adequate showing of causation to

support a denial of qualified immunity, the psychiatrists' fallback position avails them naught.

V. THE REMAINING APPELLANTS

The plaintiff alleges that the remaining three appellants have supervisory liability under section 1983 for their individual failures to keep Diaz-Martinez unarmed and away from the public. The affected appellants unanimously deny this averment. Their separate summary judgment motions maintain that, at the least, qualified immunity attaches. Consequently, we troll the record in search of facts bearing on the putative immunity of each appellant. We then examine those collected facts to determine the basis of the district court's decision (and, thus, the existence vel non of appellate jurisdiction). Lastly, we proceed to determine whether the district court erred in rejecting the qualified immunity defense.

A. Diaz-Pagan.

The summary judgment record reveals the following uncontested facts concerning Diaz-Pagan.

- In January 1994, Diaz-Martinez joined the Bayamon CIC. Throughout his tenure there, Diaz-Pagan served as the unit's director.

- As director, Diaz-Pagan had the authority to oversee and countermand his subordinates' staffing decisions and/or to dispatch police officers for special human relations training to minimize the likelihood of future outbursts.

- Diaz-Pagan also possessed the authority to ensure that Diaz-Martinez would remain in an

administrative position, removed from public contact.

- By early 1994, Diaz-Pagan had read the Calderon Report and was aware of Diaz-Martinez's extensive history of violence, including the 1989 hostage-taking incident, a 1993 death threat against Diaz-Martinez's landlord, the September 1993 shootings, and a very recent death threat against a fellow officer. This compendium of incidents led Diaz-Pagan to advise the area commander, Col. Pablo Santiago-Gonzalez, that Diaz-Martinez "displays a pattern of behavior which requires special attention."

- Notwithstanding the foregoing, Diaz-Pagan neither recommended Diaz-Martinez for special human relations training nor intervened to assure that Diaz-Martinez's assignments would insulate him from public contact.

- Diaz-Pagan did not alert his subordinates who were in charge of day-to-day operations to the risk that he himself foresaw.

- Despite his foreknowledge of the imminent danger that rearming Diaz-Martinez entailed, Diaz-Pagan did not take any measures to influence whether Diaz-Martinez would be rearmed.

- Although he professed "surprise[ ]" when he learned (prior to the incident involving Camilo-Robles) that Diaz-Martinez's weapon had been restored, Diaz-Pagan acquiesced in that action and did not attempt to rescind it.

- When Diaz-Pagan left for vacation on April 18, 1994, he neglected to inform his temporary replacement, Capt. Jorge Hernandez-Colon, of Diaz-Martinez's disciplinary record.

B. Santiago-Gonzalez.

The summary judgment record reveals the following uncontested facts concerning Santiago-Gonzalez.

- Santiago-Gonzalez served as Bayamon area commander during the time in question.

- Santiago-Gonzalez knew of Diaz-Martinez's violent history. He had received the Calderon Report and had personally overseen the efforts to calm the affected neighborhood in the wake of the 1993 double shooting.

- Diaz-Pagan identified Santiago-Gonzalez as his "boss" and as "the person who has control of the Area." Thus, the chain-of-command observations set forth as to Diaz-Pagan apply with at least equal force to Santiago-Gonzalez.

- The superintendent of police testified that: "It is the discretion of the Area Commander [Santiago-Gonzalez] to assign [officers] to the different units."

- Santiago-Gonzalez enjoyed the discretion to assign Diaz-Martinez to desk duty or other administrative work, yet failed to use this power to make certain that the rogue officer would not come in contact with the public.

C. Toledo-Davila.

The summary judgment record reveals the following uncontested facts concerning Toledo-Davila.

- Toledo-Davila served as police superintendent throughout the time in question.

- The police superintendent is the only person empowered to assign a regulation weapon to a

member of the police force, and has plenary discretion to withhold or confiscate a weapon in those cases in which he deems such action appropriate. *See Puerto Rico Police Department Personnel Reg.* § 9.3(1)(a), (d).

- Toledo-Davila knew the details of Diaz-Martinez's violent record. He also knew that the Puerto Rico Department of Justice had assumed control of the investigation into the September shootings, and that as of February 1994 its investigation was ongoing.

- Toledo-Davila abdicated his duty to exercise independent judgment in determining which officers should bear arms. In that respect, he stated that once a psychiatrist certifies an officer as fit for duty, "the superiors are notified . . . [a]nd then we proceed to give back the weapon."

D. Appellate Jurisdiction.

After full consideration of the record, we believe that the district court supportably assumed a set of documented facts from which it denied the supervisors' motions for summary judgment as a matter of law. Consequently, we have jurisdiction to review the district court's decision.

Our rationale is straightforward. On the record as it stands, the facts as to these appellants' powers, functions, conduct, and omissions are not seriously disputed, nor are the facts as to what corrective measures were available to them. This makes it very likely that the district court assumed the facts to be as stated. That the district

court did not wait for the plaintiff's opposition – a practice that we do not commend – buttresses this conclusion and suggests that the court did not believe it necessary for the plaintiff to adduce additional facts because the facts that already were in the record, assumed as true and interpreted favorably to the plaintiff, were insufficient as a matter of law to warrant the application of qualified immunity. Thus, we turn to the correctness of that conclusion, again taking the supervisors one by one.

E. Qualified Immunity – Diaz-Pagan.

Diaz-Pagan trumpets that Diaz-Martinez was not under his direct command, and that, in all events, he was on vacation when Diaz-Martinez allegedly assaulted Camilo-Robles. Based largely on these undisputed facts, Diaz-Pagan maintains that he deserves qualified immunity because there is no causal link between his conduct and the assault on Camilo-Robles.

This argument speaks less to qualified immunity and more to the merits – and a denial of summary judgment on the merits, even in a section 1983 case, is not immediately appealable. *See Domegan*, 859 F.2d at 1061. Still, a plausible causal chain is relevant to the objective legal reasonableness of a state actor's conduct and, viewed in that light, Diaz-Pagan's contentions are not entirely off base. At any rate, on the assumed set of facts the court supportably could have concluded that Diaz-Martinez presented a serious risk of harm and that Diaz-Pagan knew as much; put another way, Diaz-Pagan "was put on notice of behavior which was likely to result in the violation of the constitutional rights of citizens." *Febus-*

Rodriguez, 14 F.3d at 93. The court likewise could have concluded that Diaz-Pagan had the authority to prevent recurrences of Diaz-Martinez's erratic behavior, but nevertheless failed to take obvious steps within his power to reduce or eliminate that risk. Similarly, the court could have found the requisite causal connection. Finally, the court could have concluded that Diaz-Pagan's omission was outside the range of mistaken judgments that the qualified immunity doctrine protects. Seen in that light, Diaz-Pagan's conduct was not objectively reasonable and, thus, qualified immunity does not attach.[10]

F. Qualified Immunity – Santiago-Gonzalez.

Santiago-Gonzalez similarly claims qualified immunity on the ground that the causal connection between his functions and Diaz-Martinez's transgressions is too attenuated to justify the imposition of section 1983 liability. As above, we examine causation insofar as it bears on qualified immunity (i.e., as an element of objective legal reasonableness).

On the facts proffered by Santiago-Gonzalez and amplified elsewhere in the record, it is plain that Santiago-Gonzalez knew that Diaz-Martinez was a ticking time bomb and also knew (or should have known) that Diaz-Martinez, if restored to active duty, was likely to commit acts that would violate the constitutional rights of

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[10] Diaz-Pagan's absence on vacation does not undermine this conclusion. His acts and omissions prior to his departure and his acknowledged failure to leave any special instructions concerning Diaz-Martinez with his stand-in sufficiently support the district court's denial of qualified immunity.

others. As was true of Diaz-Pagan, Santiago-Gonzalez had both the authority and the opportunity to prevent Diaz-Martinez from interacting with the public, yet failed to intervene. Accordingly, his indifference and the assault on Camilo-Robles were causally linked. In a nutshell, on the assumed set of facts revealed by the summary judgment record the district court supportably could conclude that Santiago-Gonzalez acted in an objectively unreasonable fashion, thus exempting his conduct from the prophylaxis of qualified immunity.

G. Qualified Immunity – Toledo-Davila.

At the end of the day, Toledo-Davila maintains that he and the officers under his command followed proper police procedures when rearming Diaz-Martinez. He adds that in all events he acted in good faith – and qualified immunity protects officers who make good-faith mistakes. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523. Although we find no evidence to suggest that Toledo-Davila (or the other appellants, for that matter) acted in bad faith, we nonetheless conclude that Toledo-Davila cannot wrap himself in the mantle of qualified immunity.

The extant record eloquently refutes Toledo-Davila's assertion that his conduct was, as a matter of law, objectively reasonable. Toledo-Davila knew of Diaz-Martinez's vicious propensities and the peril presented; he had the sole de jure responsibility to authorize rearming; and yet he treated Diaz-Martinez not as a dangerous sociopath, but as any other officer. To cinch matters, a causal relationship existed between Toledo-Davila's conduct and the

incident at the Bayamon Judicial Center. We think that the police superintendent's latitudinarian approach in the face of Diaz-Martinez's patent instability was so far outside the realm of reasonableness that it rendered him ineligible for protection under the qualified immunity doctrine.

VI. CONCLUSION

We add an eschatocol of sorts. This is a hard case, for it does not readily fit the mold cast by the Court's precedents. We believe it is possible that the Court, when confronted with a claim of qualified immunity in a deliberate indifference case, may recognize the awkwardness of the fit and formulate a special set of rules to cover such situations. Until further guidance emerges, however, we have little choice but to apply the existing qualified immunity paradigm across the board. We have endeavored to do so here.

We need go no further. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). In this case, none of the appellants consciously chose to violate the law. If the assumed facts indicated that they were merely inattentive or careless, then qualified immunity would shield them despite the fact that Diaz-Martinez violated the plaintiff's clearly established rights. *See, e.g., Ringuette*, 146 F.3d at 5-6; *Brennan*, 888 F.2d at 194. Here, however, indulging reasonable pro-plaintiff inferences, the record shows conduct on the appellants' part that can best be described as reckless and wanton – conduct that is emblematic of the

plain incompetency to which the *Malley* Court alluded. The appellants' behavior is, therefore, outside the wide band of mistaken police judgments that the qualified immunity doctrine is intended to shield and the appellants, to a man, are not entitled to summary judgment.

Affirmed. Costs in favor of appellee.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-2261

GRAND CID CAMILO-ROBLES,
Plaintiff-Appellee,

v.

MIGUEL DIAZ-MARTINEZ, ET AL.,
Defendants-Appellees.

PEDRO A. TOLEDO-DAVILA,
Defendant-Appellant.

BEFORE

*

CAMPBELL, Senior Circuit Judge,
SELYA, BOUDIN, STAHL, LYNCH and LIPEZ
Circuit Judges

ORDER OF COURT

Entered: August 18, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

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* Chief Judge Torruella is recused from this case.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: /s/ JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Mr. Nevares and Ms. Berkan]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GRAND CID CAMILO ROBLES	:	
Plaintiff	:	
	:	
vs	:	CIVIL
MIGUEL DIAZ-MARTINEZ, PEDRO A. TOLEDO-DAVILA, PABLO SANTIAGO-GONZALEZ, GILBERTO DIAZ-PAGAN, JORGE L. HERNANDEZ-COLON, JOSE R. ZAPATA-RIVERA, LOURDES I. GONZALEZ-DIAZ, GUILLERMO JOSE HOYOS, HECTOR O. RIVERA-GONZALEZ and JOHN DOE	:	95-1540CCC
Defendants	:	

ORDER

(Filed Aug. 28, 1997)

Having considered the Motion for Summary Judgment filed by defendants Dr. Guillermo J. Hoyos-Precssas and Dr. Héctor Rivera-González (**docket entry 133**), plaintiffs opposition (**docket entry 166**), and defendant's tendered reply; defendant Pedro Toledo-Dávila's Motion for Summary Judgment (**docket entry 134**), and its brief in support (docket entry 160); defendant Gilberto Díaz-Pagán's Motion for Summary Judgment (**docket entry 136**), and the memorandum of law in support of it (**docket entry 145**); the Motion for Summary Judgment filed by defendant Jorge L. Hernández-Colón (**docket entry 139**); the Motion for Summary Judgment filed by defendant Pablo Santiago-González (**docket entry 141**);

and all the exhibits submitted, which included the Opinion and Order issued by Judge Laffitte in Civil Action 942184(HL), all said motions are DENIED.

The Motion for Partial Summary Judgment on Liability With Respect to Defendants Hoyos and Rivera-González filed by plaintiff (**docket entry 168**), having considered defendant's opposition (**docket entry 181**), is DENIED.

SO ORDERED.

At San Juan, Puerto Rico, on August 28, 1997.

/s/ Carmen Consuelo Cerezo
CARMEN CONSUELO CEREZO
Chief, U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MARIA TERESA DIAZ, et al, Plaintiffs, v. MIGUEL DIAZ MARTINEZ, et al, Defendants.	Civil No. 94-2184 (HL)

OPINION AND ORDER

(Filed July 17, 1996)

Before the Court are the motions for summary judgment of Defendants Dr. Héctor Rivera González ("Rivera González") and Dr. Guillermo José Hoyos ("Hoyos") in this action for damages under section 1983.[1] Rivera González and Hoyos (collectively "the psychiatrists") were psychiatrists in the medical division of the Puerto Rico police department at the time of the incident which gives rise to this action. Other members of the police department are also defendants in this case. This action arises out of an incident that involved Defendant police officer Miguel Díaz Martínez ("Díaz Martínez") and resulted in the death of José Manual [sic] Rosario Díaz ("Rosario Díaz"). Plaintiffs are Maria Teresa Díaz, Rosario Díaz' mother, appearing in her individual capacity and as the heir of Rosario Díaz; Maria M. Rosario Díaz ("María Rosario"), his sister; his aunt María del Pilar Ramos

[1] 42 U.S.C.A. § 1983 (West 1994).

Lafontaine ("María Ramos"); his grandmother Bienvenida Lafontaine; and his uncle Héctor Gabriel Ramos Lafontaine. Plaintiffs allege violations of their Fourth, Fifth, and Fourteenth Amendment rights. They also claim that they are entitled to relief for Puerto Rico law claims brought pursuant to the Court's supplemental jurisdiction.[2]

The Court reviews the record in the light most favorable to Plaintiffs and draws all reasonable inferences in their favor. *See LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1993). Plaintiffs allege the following in their third amended complaint: On September 8, 1993, Díaz Martínez and another officer were on duty at the Barbosa Housing Project in Bayamón, Puerto Rico. An incident ensued involving Díaz Martínez, Rosario Díaz, María Rosario, and María Ramos. Plaintiffs allege that Díaz Martínez used offensive language in asking Rosario Díaz for documents pertaining to his automobile and residence; that when María Rosario objected to Díaz Martínez' language, he shot her in the leg; that he then pressed his revolver against María Ramos' stomach, threatened to kill her, and threw her to the ground; and that Díaz Martínez then shot Rosario Díaz when he tried to assist María Rosario. Rosario Díaz subsequently died of this gunshot wound.

Díaz Martínez was appointed to the police department in 1986.[3] As a police officer he had been involved in

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[2] 28 U.S.C.A. § 1367 (West 1993).

[3] Docket no. 176, exhibit 3.

a number of incidents which required disciplinary investigations.[4] One of these incidents occurred in August 1989, when Díaz Martínez went to a police precinct in Cataño, Puerto Rico. He grabbed the shotgun of an officer on duty, pointed it at him, and threatened to kill the officer and then kill himself.[5] The crisis was diffused without incident. Díaz Martínez was suspended for his actions, however, and on March 20, 1991, he was expelled from the police force.[6] Díaz Martínez appealed his expulsion to the Investigation, Prosecution and Appeals Commission ("the Commission").[7] By a resolution dated May 21, 1992, the Commission revoked the expulsion.[8] The Puerto Rico Superior Court affirmed the Commission's resolution in a judgment dated December 11, 1992.[9]

Díaz Martínez was reinstated on March 25, 1993,[10] but he was not permitted to carry a firearm. He was referred to the police department's medical division for a psychiatric evaluation to determine whether he could perform the duties of a police officer and whether he should be permitted to carry a firearm.[11] Additionally, the police superintendent issued a memorandum dated

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[4] Docket no. 176, exhibit 2, 6.

[5] Docket no. 55, exhibit C.

[6] Docket no. 176, exhibit 8.

[7] Any police officer against whom an adverse decision has been rendered may appeal the decision to this Commission. P.R. Laws Ann. tit. 25, § 1014(h) (1980).

[8] Docket no. 176, exhibit 9.

[9] Docket no. 176, exhibit 10.

[10] Docket no. 176, exhibit 12.

[11] Docket no. 147, exhibit 8; docket no. 176, exhibit 17, at 21.

July 23, 1993, in which he requested a psychiatric evaluation for Díaz Martínez because one of the officers interviewed in an investigation of Díaz Martínez recommended that he not be allowed to carry a firearm.[12]

On June 30, 1993, Hoyos interviewed Díaz Martínez.[13] As part of the evaluation, Hoyos reviewed the following: Díaz Martínez' file, which contained a diagnosis done by a Dr. Victor Pagán Davis in 1990; Díaz Martínez' records of his stay at Mepsi Center, a psychiatric institution; and the records of Dr. Ríos Cervantes, who had been the psychiatrist of record for Díaz Martínez.[14] Hoyos told Díaz Martínez that he would have to return to the medical division for a second evaluation; that until the evaluation was completed he would not be allowed to carry a firearm; that Hoyos was requesting a report from Díaz Martínez' supervisor and a report from a psychologist at the police department's human resources division; and that his wife would also have to be interviewed.[15] Before the second interview, Hoyos obtained a report from Díaz Martínez' supervisor.[16] The supervisor recommended Díaz Martínez and reported that he had performed quite well since he rejoined the police force in March 1993.[17]

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[12] Docket no. 147, exhibit 9 (English translation at docket no. 170, exhibit 9).

[13] Docket no. 170, exhibit 20; docket no. 176, exhibit 14, at 42; docket no. 149, declaration of Dr. Guillermo José Hoyos.

[14] Docket no. 176, exhibit 14, at 44-47.

[15] Docket no. 176, exhibit 14, at 57.

[16] Docket no. 176, exhibit 14, at 75-76.

[17] Docket no. 170, exhibit 25.

On August 27, 1993, Hoyos had a second interview with Díaz Martínez; on that same day Hoyos met with Díaz Martínez' second wife, who is also a police officer.[18] Rivera González also met with and evaluated Díaz Martínez on August 27, 1993.[19] Following these evaluations, Hoyos and Rivera González issued a report on Díaz Martínez which was dated August 27, 1993. Their report read as follows: "At present, there is no psychopathological finding, nor in the personal background nor mental exam to indicate a disability to be able to perform the inherent functions as a law and order officer in this agency."[20] The report made no specific recommendations as to whether Díaz Martínez should be allowed to carry a firearm. Hoyos and Rivera González issued their report without having access to the report of the psychologist from the human resources division and without Díaz Martínez' prior complaint history.[21] Pursuant to this report, Lieutenant José Vélez Irizarry, the acting coordinator of the replacement center for the police department's office of the assistant superintendent for field operations, issued a letter on August 27, 1993, to the police department's supplies division. The letter read as follows:

> [Miguel Díaz Martínez] has been disarmed for technical reasons of the Replacement Center.

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[18] Docket no. 176, exhibit 14, at 75.

[19] Docket no. 176, exhibit 17, at 20-21; docket no. 170, exhibit 22.

[20] Docket no. 147, exhibit 30.

[21] Docket no. 176, exhibit 14, at 69, 73-74.

> The Police Physician recommended that he can work while armed and we do *not* object to his being assigned a regulation weapon.
>
> We hereby request that he be assigned same.[22]

Díaz Martínez was rearmed and assigned to the Barbosa Housing Project. On September 8, 1993, he was involved in the incident with Plaintiffs which gives rise to the present action.

Plaintiffs allege that Hoyos and Rivera González were responsible for evaluating and identifying psychologically unfit police officers; that they knew of Díaz Martínez' history of disciplinary problems; that their report on Díaz Martínez constituted deliberate indifference to Plaintiffs' constitutional rights; and that the acts of Hoyos and Rivera González were the direct and proximate cause of Plaintiffs' constitutional injuries. In their motions for summary judgment, the psychiatrists argue that their evaluation of Díaz Martínez does not amount to deliberate indifference and that they did not cause Plaintiffs' injuries. Plaintiffs have opposed the motions for summary judgment. For the reasons set forth below, the Court grants Hoyos, and Rivera González' motions for summary judgment.

DISCUSSION

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). The party moving for summary

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[22] Docket no. 170, exhibit 33 (emphasis in original).

judgment bears the initial responsibility, of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the moving party has satisfied this requirement, the nonmoving party has the burden of presenting any facts that demonstrate a genuine issue for trial. Fed. R. Civ. P. 56(e); *LeBlanc*, 6 F.3d at 841. The nonmovant must do more than show "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). An issue is genuine when, based on the evidence, a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. at 2512.

A claim under section 1983 has two essential elements: (1) the conduct complained of must have been committed under color of state law, and (2) the conduct must have worked a denial of rights that are protected by the Constitution or laws of the United States. *Martinez v. Colon*, 54 F.3d 980, 984 (1st Cir. 1995). This second element has two aspects: (i) there must have been a deprivation of federal rights and (ii) there must have been a causal connection between the conduct complained of and the deprivation of rights. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir. 1989); *Voutour v. Vitale*, 761 F.2d 812, 819 (1st Cir. 1985). Furthermore, section 1983 allows recovery for a loss of life or other serious physical injury

only where the defendants have acted intentionally or with "deliberate indifference" to the plaintiff's constitutional rights. *Manarite v. City of Springfield*, 957 F.2d 953, 955 (1st Cir. 1992). Deliberate indifference is something more than ordinary negligence and probably something more than gross negligence. *Id.* at 956. Deliberate indifference can be described as "recklessness" in the criminal-law sense and requires an actual knowledge of impending harm. *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991). It is the type of conduct that would offend the "evolving standards of decency in a civilized society." *Id.* at 18. In order to demonstrate deliberate indifference, a plaintiff must show that a defendant had "a culpable state of mind and intended wantonly to inflict pain." *Id.* at 19.

In the case before the Court, the record indicates that Hoyos interviewed Díaz Martínez twice and that Rivera González interviewed him once. The record also indicates that these two psychiatrists met with Díaz Martínez' wife, reviewed the officers' psychiatric records, and considered the recommendation of his supervisor. The procedure they used in evaluating Díaz Martínez does not indicate that they acted with deliberate indifference. In their opposition, Plaintiffs argue that the psychiatrists, prior to making a final determination, should have obtained Díaz Martínez' prior complaint history, should have obtained the report of the psychologist from the human resources division, and should have interviewed Díaz Martínez' first wife, who had accused him of beating her. Although the psychiatrists did not have Díaz Martínez' prior complaint history, they were aware that he had been expelled

from the force in 1991.[23] It may be that the psychiatrists could have been more extensive in the scope of material to be considered in order to make their determination. However, such a failure to be more thorough would constitute, at most, negligence by the psychiatrists. Mere negligence is not sufficient to support a claim under section 1983; the defendants must have acted with deliberate indifference. *Manarite*, 957 F.2d at 956. A mental health professional's lack of due care in performing therapy and preparing reports is not sufficient to constitute a constitutional violation. *Watterson v. Page*, 987 F.2d 1, 8-9 (1st Cir. 1993).

In their opposition Plaintiffs also submitted a report by Dr. Glenn Ross Caddy, a clinical psychologist. Dr. Caddy criticizes the judgment of and procedures used by Defendant psychiatrists in evaluating Díaz Martínez.[24] The fact that mental health professionals disagree over treatment or procedure may be sufficient to create a genuine issue of material fact in a case for malpractice; this disagreement is not, without more, sufficient to demonstrate deliberate indifference. *Herman v. Clearfield County Pa.*, 836 F.Supp. 1178, 1186 (W.D.Pa. 1993), *aff'd*, 30 F.3d 1486 (3rd Cir. 1994); *see also Estelle v. Gamble*, 429 U.S. 97, 105-06, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976) (Medical malpractice or an inadvertent failure to provide adequate medical care generally does not constitute deliberate indifference). A difference of medical opinion does not normally constitute deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). It may be that

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[23] Docket no. 176, exhibit 14, at 48-49.

[24] Docket no. 176, exhibit 20.

Defendant psychiatrists erred in their decision to recommend that Díaz Martínez be returned to normal duty and that the procedure they used to reach this decision was flawed. However, any such errors do not constitute a recklessness in the criminal-law sense and do not demonstrate that Defendant psychiatrists acted with "a culpable state of mind and intended wantonly to inflict pain." *See DesRosiers*, 949 F.2d at 19. Thus, there is no genuine issue of fact as to whether Hoyos and Rivera González acted with deliberate indifference.

Even if there were a genuine issue of fact as to whether Defendant psychiatrists acted with deliberate indifference, Plaintiffs' claims against them would fail for a second reason. A section 1983 plaintiff must show that a defendant's conduct caused the plaintiff's deprivation of constitutional rights. *Gutierrez-Rodriguez*, 882 F.2d at 559; *Rodriguez Cirilo v. Garcia*, 908 F.Supp. 85, 91 (D.P.R. 1995). The conduct by Defendant psychiatrists of which Plaintiffs complain is their recommendation that Díaz Martínez be returned to regular duty. Defendant psychiatrists did not have the final determination, however, as to whether Díaz Martínez would be allowed to carry a firearm. The request that he be given a firearm was made by Lieutenant José Vélez Irizarry,[25] from the office of the assistant superintendent for field operations.[26] It appears that Lieutenant Vélez Irizarry requested a firearm for

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[25] The Court notes that José Vélez Irizarry, the officer who requested that Díaz Martínez be rearmed, is not a defendant in this case.

[26] Docket no. 170, exhibit 33.

Díaz Martínez because of the psychiatrists' report. However, the Puerto Rico police department's regulations provide that it is the superintendent, not medical division psychiatrists, who determine whether an officer will be allowed to carry a firearm.[27] Díaz Martínez could have been denied the use of a firearm, notwithstanding the psychiatrists' recommendation that he be allowed to perform the regular functions of a police officer. Moreover, the psychiatrists' report made no specific recommendations as to whether Díaz Martínez should be allowed to carry a firearm. Thus, the causal nexus is simply too tenuous to link the conduct of Hoyos and Rivera González to the injuries suffered by Plaintiffs.

Lastly, Plaintiffs have also brought Puerto Rico law claims against Hoyos and Rivera González pursuant to the Court's supplemental jurisdiction. The assertion of supplemental jurisdiction over state law claims is within a federal court's discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). If federal law claims are dismissed before trial, however, the state law claims should also be dismissed. *Id.* at 726, 86 S.Ct. at 1139; *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990); *Soto v. Carrasquillo*, 878 F.Supp. 324, 332 (D.P.R. 1995). Accordingly, the Court hereby dismisses without prejudice Plaintiffs' Puerto Rico law claims.

For all of the above reasons, the Court finds that Plaintiffs have failed to demonstrate that there is a genuine issue of material fact as to their claims pursuant to

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[27] Docket no. 170, exhibit 34, § 9.3.

section 1983 against Hoyos and Rivera González. Accordingly, the Court hereby grants their motions for summary judgment (docket nos. 147 and 149) and dismisses with prejudice Plaintiffs' claims pursuant to section 1983 and dismisses without prejudice Plaintiffs' Puerto Rico law claims.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 17, 1996.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MARÍA TERESA DÍAZ, et al, Plaintiffs, v. MIGUEL DÍAZ MARTÍNEZ, et al, Defendants.	Civil No. 94-2184 (HL)

PARTIAL JUDGMENT

(Filed July 17, 1996)

The Court having entered an opinion and order on this same date, and there being no just cause for delay, judgment is hereby entered dismissing with prejudice Plaintiffs' section 1983 claims against Guillermo José Hoyos and against Héctor Rivera González and dismissing without prejudice Plaintiffs' Puerto Rico law claims against Guillermo José Hoyos and against Héctor Rivera González.

San Juan, Puerto Rico, July 17, 1996.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
U.S. District Judge

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

AMENDMENT IV – US CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V – US CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV – US CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Sec. 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 Sec. 1988

> **"(a) Applicability of statutory and common law**
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the

constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the Untied [sic] States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

26 LPRA Sec. 4105:

"No health service professional may be included as a defendant in a civil suit for damages due to malpractice caused in the performance of his profession while said health professional acts in compliance with his duties and functions as an employee of the Commonwealth of Puerto Rico, its dependencies, instrumentalities and municipalities."

Rule 27 (a) of Puerto Rico's Rules of Supreme Court, 4 LPRA, App. I-A, states:

> "This Court may take cognizance of any matter certified for it by the Supreme Court of the United States, a Circuit Court of Appeals of the United States, a District Court of the United States, or the highest appellate court of any of the states of the Union, whenever it is thus requested by any of said courts, if before the petitioner court there is any judicial matter involving questions of Puerto Rican law which may determine the result thereof, and with regard to which, in the opinion of the petitioner court, there are no clear precedents in the case law of this Court."

Puerto Rico's Civil Code, Article 1802, 31 LPRA sec. 5141:

> "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity."

Puerto Rico Police Department Personnel Regulations, Sections 9.3 (1)(a) and (d) which state:

> (a) "All members of the Force shall wear such regulation weapons as the Superintendent may determine. This weapon must be carried in its holster and be duly secured."
>
> (d) "The [Police] Superintendent shall have discretion to not assign or confiscate the regulation weapon in those cases where he deems it appropriate."

IN THE SUPREME COURT OF PUERTO RICO

Ulises Lind Rodríguez *et al.*,

Plaintiffs and appellants

v.

The Commonwealth of Puerto Rico, and Corporation Insular de Seguros,

Defendants, appellant the first and appellee the second

Nos. R-81-281
R-81-257
Review

San Juan, Puerto Rico, February 2, 1982

PER CURIAM: The trial court dismissed through a partial summary judgment the complaint filed by plaintiffs-appellants against a physician and his insurer for the death of the minor Eric Lind Cartagena, which death was allegedly caused by the lack of medical skill of the physician Juan Miranda who, at the time, was a Commonwealth employee and was also engaged in the private practice of medicine.

The trial court did not err in dismissing the complaint. Article 41.080 of the Insurance Code releases from liability not only those physicians who work exclusively for the Commonwealth, but also those who, as in this case, are engaged in the private practice while complying with their duties as employees of the Commonwealth. 26 L.P.R.A. § 4108.[1]

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[1] Article 41.080 provides in part:

"No health care professional may be included as a plaintiff in a claim for damages for malpractice in the exercise of his profession while such health care professional is acting in compliance with his duties

In *Vázquez Negrón v. E.L.A.*, 109 D.P.R. 19 (1979), we upheld said position vis-à-vis an attack grounded on the equal protection guarantee because we were not dealing with a suspect classification requiring strict scrutiny to determine its propriety but, on the contrary, with a reasonable classification that responded to the particularly compelling government interest of confronting those serious problems that endanger public health. In the case at bar, the plaintiffs-appellants challenge the constitutionality of the above-mentioned art. 41.080 also on the ground that it violates the equal protection guarantee, although this issue was not raised before the trial court or considered by the latter in its partial summary judgment. Notwithstanding the fact that such an omission would be sufficient to set aside the issue, we have examined appellants' arguments and they do not persuade us to change our decision in *Vázquez Negrón, supra.*

The Commonwealth, which is also an appellant in this case, contends that the trial court erred in dismissing the action against the physician's insurance company. It alleges that the cause of action against the insurer is independent from that of the insured, pursuant to arts. 20.010 and 20.030 of the Insurance Code, 26 L.P.R.A. §§ 2001 and 2003,[2] and that the physician's immunity defense is personal. We do not agree.

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and functions as an employee of the Commonwealth of Puerto Rico, its agencies, instrumentalities and municipalities."

[2] Article 20.010 reads:

"The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury,

We are not deàling here with a personal defense of the physician from claims against him, but with the inexistence [sic] of a cause of action. As we have already seen, the above-mentioned art. 41.080 provides absolute immunity for Commonwealth-employed physicians for their tortious acts in the course of their employment. This is not a personal defense – as the lack of notice on the

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death, or damage to property of a third person, shall become absolutely liable whenever a loss covered by the policy occurs, and payment of such loss by the insurer to the extent of its liability therefor under the policy shall not depend upon payment by the insured of or upon any final judgment against him arising out of such occurrence."

Article 20.030 provides:

"(1) Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under their terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly. The direct action against the insurer may only be exercised in Puerto Rico. The liability of the insurer shall not exceed that provided for in the policy , and the court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section shall be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured.

"(2) If the plaintiff in such an action brings suit against the insured along, such shall not be deemed to deprive him of the right, by subrogation to the rights of the insured under the policy, to maintain action against and recover from the insurer after securing final judgment against the insured."

Commonwealth would be – where there is a possibility of bringing an action against the insurer. *Cortés Román v. E.L.A.*, 106 D.P.R. 504 (1977); *García v. Northern Assurance Co.*, 92 P.R.R. 236 (1965); *Trigo v. Travelers Ins. Co.*, 91 P.R.R. 843 (1965). Since there is no cause of action against the insured, the insurer is not liable. *Admor. F.S.E. v. Flores Hnos. Cement Prods.*, 107 D.P.R. 789 (1978).

Finally, we need not pass on plaintiffs-appellants' assignment to the effect that, when the physician failed to deny in his answer to the amended complaint that his insurance policy would cover the damages alleged in said complaint, he waived the possibility of invoking his immunity later on. Once we have decided that said immunity is not a personal defense, but rather the inexistence [sic] of a cause of action, the same cannot be waived and may be invoked at any time. Rules 10.2(5) and 10.8(b) of the 1979 Rules of Civil Procedure.

The judgment appealed is affirmed.

Mr. Justice Irizarry Yunqué and Mr. Justice Negrón García concur in the result without an opinion.

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Rafael Flores Román, etc.,

Plaintiffs and appellants

v. **No. RE-88-297 Review**

José Ramos González, etc.,

Defendants and appellees

JUSTICE HERNANDEZ DENTON delivered the opinion of the Court.

San Juan, Puerto Rico, December 18, 1990

We must determine here whether doctors who work under contract with the State Insurance Fund (hereinafter the Fund) are protected by the sec. 41.080 immunity granted by Act No. 55 of July 18, 1978, as amended, 26 L.P.R.A. sec. 4105. The plaintiffs seek reversal of the Superior Court judgment which finds that doctors under contract with the Fund are protected by the statute. In view of the terms of the contractual relationship between the parties and the language of the statute, the partial judgment appealed should be reversed.

I

This controversy has its origin in a complaint filed on November 28, 1984, by appellant Rafael Flores Román against Dr. Eric Carro, Dr. Rafael Rivera, the Manager of the State Insurance Fund, and several insurance companies. Flores Román alleged that as a result of an occupational accident the Fund referred him to doctors Carro

and Rivera, who administered him the wrong medical treatment as a result of which he developed an incurable condition that permanently incapacitated him.

[Seal]

The doctors sued timely raised, among others, the affirmative defense of immunity under sec. 41,080 of Act No. 55, as amended, because they had administered the medical treatment under a contract for services with the Fund. On June 10, 1985, Flores Román filed an amended complaint objecting to the defense of immunity and challenging the constitutionality of the statute because it violated the equal protection and due process clause.

After several proceedings, the trial court concluded that the treatment was administered under the terms of a contract with the Fund, and that since the services were rendered in the interest of said entity, the "statutory immunity is also applicable when the services are rendered by doctors not employed by the Government." Appendix to Petition for Review, at 128. Also, the trial court upheld the constitutionality of the statute at issue here based on *Vázquez Negrón v. E.L.A.*, 109 D.P.R. 19 (1979), and *Lind Rodríguez v. E.L.A.*, 112 D.P.R. 67 (1982).

In a petition for review, Flores Román seeks reversal of the partial judgment rendered by the trial court alleging that the codefendants-appellees are independent contractors and, as such, are not protected by Act No. 55. He assigns two errors: (1) the court's conclusion that the doctors are protected by sec. 41.080 of Act No. 55; and (2) the use by the court of a rational nexus test to pass upon the constitutionality of the statute. We issue the writ in consideration of the fact that we have to determine if Act

No. 55 grants immunity to physicians working under contract with the Fund, and that the courts of first instance have construed this judicial controversy in many different ways. Except for the codefendant physicians, all the parties involved have appeared. The petition was timely submitted for the adjudication on the merits.

II

We construe the text of Act No. 74 of May 30, 1976, as amended by Act No. 55,[1] relying on the premise that the statute established a medicohospital professional liability program, "in order to offer the community that receives health services social protection against the damages for fault or negligence due to malpractice." Statement of Motives of Act No. 6 of December 30, 1986. (1986 Laws of Puerto Rico 927.)

[1] From this standpoint, in sound legal hermeneutics, this provision must be strictly construed when there exists a condition that limits the right of the aggrieved persons to seek redress. *Vázquez Negrón v. E.L.A., supra*, at

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[1] These provisions are presently contained in 26 L.P.R.A. sec. 4105. Insofar as it is pertinent, said section provides:

> "No health service professional may be included as a defendant in a civil suit for damages due to malpractice caused in the performance of his profession while said health service professional acts in compliance with his duties and functions as an employee of the Commonwealth of Puerto Rico, its dependencies, instrumentalities and municipalities."

To adjudicate this controversy, we will use the text of the law in force at the time of events.

25; *Insurance Co. of P.R. v. Ruiz Morales*, 96 P.R.R. 170, 174 (1968).

[2] The text of sec. 41.080 of Act No. 55, as amended, is particularly clear and specific. With this provision, the Legislative Assembly granted physicians immunity from the actions for damages resulting from malpractice in the practice of their profession "while such health care [professionals are] acting in compliance with [their] duties and functions as [employees] of the Commonwealth of Puerto Rico, its agencies, instrumentalities and municipalities." 1978 Laws of Puerto Rico 548. Thus, to be granted immunity, a person must meet the following requirements: (1) he must be a health care professional; (2) the harm caused by his malpractice must have taken place in the practice of his profession; and, (3) he must have acted in compliance with his duties and functions as an employee of the Commonwealth of Puerto Rico, its agencies, instrumentalities, and municipalities.

[3-4] In *Lind Rodríguez* and *Vázquez Negrón* we upheld the validity of this provision against some constitutional attacks based on the equal protection and due process clause. There, we defined the scope of the immunity granted by the statute: "[Section] 41.080 of the Insurance Code releases from liability not only those physicians who work exclusively for the Commonwealth, but also those who, as in this case, are engaged in the private practice while complying with their duties as *employees* of the Commonwealth." *Lind Rodríguez v. E.L.A.*, *supra*, at 68. (Underscore supplied.) Since the defendant physician in that case was a Commonwealth employee who was also engaged in private practice, we held that he

had absolute immunity from "[his] tortious acts [committed] in the course of [his] employment." *Id.* at 69.

[5] The statute clearly states that it protects physicians that hold career and confidential positions in the Commonwealth, its agencies or instrumentalities, including the Fund,[2] if and when the harm or damage is caused while they are engaged in the practice of their profession as employees of said government agencies. The statute also "releases from liability not only those physicians who work exclusively for the Commonwealth, but also those who . . . are engaged in the private practice while complying with their duties as employees of the Commonwealth." *Lind Rodríguez v. E.L.A., supra,* at 68.

III

With regard to personnel under contract, however, we must determine whether the harm was caused while

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[2] The Puerto Rico Public Service Personnel Act (the Personnel Act), 3 L.P.R.A. secs. 1301-1431, establishes only two categories of public employees: career and confidential. 3 L.P.R.A. sec. 1349. Although sec. 10.6 of the act provides that said statute shall not apply to employees of government agencies and instrumentalities entitled to bargain collectively, 3 L.P.R.A. sec. 1338 (4), the statute requires these agencies to adopt regulations incorporating the merit principle for the benefit of personnel not covered by collective bargaining agreements. 3 L.P.R.A. sec. [1338]. The State Insurance Fund (the Fund), in keeping with the provisions of this act, adopted personnel regulations that classify employees into two categories similar to those established in the Personnel Act. It also created analogous positions in all its divisions. See Personnel Regulations of the State Insurance Fund of March 1, 1983, at 10-13.

the professional in question was performing his duties as an agency employee who had the responsibilities assigned to a position within the organization of the agency, or if the degree of control exercised by the employer over his work was similar to that exer'ɔd over the work of an employee.

[6-7] The rule governing contracts in the Executive Branch has consistently been that "a contract for certain specific services with a person does not create an employment in the Government of the Commonwealth." Op. Sec. Just. No. 1974-7 (March 8, 1974), at 35. (Italics omitted.) Nevertheless, "each contract must be examined separately to determine if, according to its terms, there is only a contractual relationship between the agency and the person or if, on the contrary, it comes forth that the person actually holds a position in the agency or instrumentality." *Id.* (Italics omitted.) To such ends we must examine the form, manner, and conditions in which the services are rendered, placing emphasis on determining whether the duties and responsibilities assigned match those of a position which requires a regular, full-time or part-time employee.[3] We must determine if the contract grants certain rights and privileges that ordinarily go along with a regular position, for example, vacation leave, sick leave, and participation in the public employee retirement system.

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[3] Section 12 of the Personnel Regulations of the Central Personnel Administration Office: Areas Essential to the Merit Principle, defines "position" as "a [set] of duties and responsibilities assigned or delegated by the [appointing] authority, which required[s] [a full-time or part-time employee]." Personnel Regulations, *supra*, at 118.

[8] On the other hand, we must also find if the relationship between the parties to a contract for services is one of employer and employee or of principal and independent contractor. The guiding rule in this case should be the nature, scope, and degree of control of the principal over the performance of the job:

> Regardless of whether or not it is exercised, the important fact is the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. It is equally important to determine whether the instructions given will have to be followed. This same control may be exercised in several ways and the relationship between the parties might be determined according to the manner the control is exercised in the light of the circumstances of each case. If the means and manner of performance of the work are controlled, the person in charge of the work would be a servant and an independent contractor relationship would exist where the person performing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment. *Mariani v. Christy*, 73 P.R.R. 729, 744 (1952); *Pérez v. Hato Rey Bldg. Co.*, 100 P.R.R. 880 (1972); *Barrientos v. Gov. of the Capital*, 97 P.R.R. 539, 547 (1969); *Landrón v. Labor Relations Board*, 87 P.R.R. 87 (1963); *Sec. of Labor v. Pedro A. Pizá, Inc.*, 86 P.R.R. 423 (1962).

[9] In the specific case of physicians, we must take into consideration the form in which the services rendered are paid; the amount invested in scientific equipment and in facilities, or the extent to which the physician depends on the equipment furnished by the

principal; whether the physician is required to have professional liability insurance, and the degree of independent judgment he may exercise in the rendering of his services. See also R. Delgado Zayas, *Manual informativo de la legislación protectora del trabajo de Puerto Rico* 73, San Juan (n. p. 1989).

[10] To pinpoint the nature of the relationship and determine whether it is protected by the statutory immunity, we must take into consideration the specific circumstances of each case. Since the statute does not protect a health service professional who has a principal-independent contractor relationship with the Government, the specific facts of each case must be analyzed when faced with a controversy over the nature of the contractual relationship.

IV

The evidence presented in this case establishes that the codefendant physicians treat patients under one-year specialist-service contracts with the Fund. By virtue of said contracts, Dr. Eric Carro, a neurosurgeon, and Dr. Rafael Rivera Pérez, a psychiatrist, agreed to evaluate and provide ambulatory treatment to patients referred by the Fund in exchange for a compensation for services rendered. It was in keeping with these contracts that the Fund referred several workers to the private offices of these specialists for treatment as private patients. Both physicians also treated other private patients in their respective offices.

The contracts do not reveal that the Fund could intervene with, or control the means and manner in which

said doctors rendered their services. The defendant physicians had at all times full responsibility for the workers' diagnoses and treatments.

Since the doctors had absolute control over the type and quality of the treatment provided to their patients, they were required by the contract to "keep in force at all times Public Liability and Malpractice Insurance Policies and submit evidence on the existence of [said policies] upon request from THE FUND." Appendix to Petition for Review, at 139. Each of the doctors released "THE FUND from all liability for claims resulting from acts or omissions committed under his supervision and control, and [agreed] to reimburse THE FUND for the legal expenses incurred by [said agency] in actions of this kind brought against THE FUND." *Id.*

Thus, the parties ratified that it was their intention that the doctors would take out public liability and malpractice insurance to cover any harm or damage caused to their patients, including the workers referred by the Fund, and release the Government from all liability for their actions while engaged in the private practice of their profession.

The physicians engaged by the Fund to treat injured workers were also responsible for hiring and supervising their technical and administrative personnel, and for paying basic costs like rent, water, electricity, and telephone bills. They were also responsible for purchasing the equipment, the materials, and the medicines necessary for effectively rendering their professional services.

On the other hand, an analysis of the terms of the contracts does not show that the physicians sued performed duties typical of a Fund employee. In the first place, both treated their patients in their private offices, not at the Fund's facilities. They were paid on the basis of services rendered or patients treated, according to a schedule of fees established for specialists working under this type of contract. They did not receive the fringe benefits to which Fund employees were entitled, and income taxes were not withheld from their compensations.

Finally, the contracts could be rescinded by either party upon a 30-day written notice.

[11] We conclude then that the contractual relationship between the physicians and the Fund was one of "independent contractors." Therefore, their actions are not protected by the immunity granted by Act No. 74, as amended.

The partial judgment appealed is reversed and the case remanded to the trial court for further proceedings.

Justice Rebollo López concurred in the result without a written opinion. Justices Negrón García and Naveira de Rodón took no part in the decision.

COMMONWEALTH OF PUERTO RICO
PUERTO RICO POLICE

PROFESSIONAL AND CONSULTING SERVICE CONTRACT

In the City of San Juan, Puerto Rico, this 11th day of October, 1993.

APPEARANCES

AS PARTY OF THE FIRST PART: THE PUERTO RICO POLICE, created pursuant to Law Number 26 of August 22, 1974, as amended, represented herein by the Superintendent, Pedro A. Toledo Davila, Esq., of legal age, married and a resident of Rio Piedras, Puerto Rico, with authority to execute this document pursuant to the provisions of Circular Memorandum No. 07-93, issued by the Honorable Secretary of Governance of Puerto Rico, on March 8, 1993, Circular Letter 1300-12-93 of the Department of the Treasury, issued on March 19, 1993, Circular Letter 1-88-89 issued by the Executive Director of the Office of Government Ethics on March 30, 1989 and the provisions of the Puerto Rico Civil Code referring to obligations and contracts and hereinafter called "THE POLICE".

AS PARTY OF THE OTHER PART: DR. GUILLERMO J. HOYOS PRECSSAS, of age, married, a Psychiatrist by profession, License Number 4008, with offices on Ashford Avenue, Ashford Medical Center, Suite 403, Condado, Puerto Rico, 00907, Social Security Number 583-12-5747, hereinafter called "HOYOS".

BOTH PARTIES STATE

That the appearing parties have agreed to formally enter into a professional service contract and are so doing it by means of this document, whereby Dr. Guillermo J. Hoyos pledges to render "THE POLICE", the services listed under the following:

CLAUSES AND CONDITIONS

FIRST: "HOYOS" pledges to provide "THE POLICE" with professional services as a Psychiatrist at the Police Medical Office. The services to be offered shall be the following:

a. To offer outpatient mental health attention and psychiatric treatment to members of the Puerto Rico Police.

b. To advise the Director of Medical Services, the Superintendent of Police and management concerning psychiatric matters.

c. To conduct psychiatric evaluations of Members of the Force and civilian personnel, including tests in the event of new arrivals, promotions, transfers and reinstatements to the Puerto Rico Police.

d. To determine the ability of the members of the force as regards the field of Psychiatry.

e. To offer out-patient mental health follow-up for cases which have been under treatment at the State Insurance Fund (Workmen's Compensation) or other medical institutions for psychiatric evaluations and to determine whether they can remain on the Force and to make the corresponding recommendations.

f. To maintain updated, psychiatric records of the patients.

g. To establish and maintain contact with State and Federal Agencies or private entities having to do with the psychiatric care of members of the Police Force.

h. To attend any psychiatric emergencies which arise at General Headquarters of the Puerto Rico Police during the regular work schedule.

i. He shall advise the Legal Office by means of written reports and/or meetings with attorneys in those cases which so warrant for the interpretation of psychiatric testing in or outside the case file, as well as appearing as an [sic] witness to provide expert testimony or opinions in such cases directly related to the report or reports in the administrative and judiciary forums whenever required therefore.

"HOYOS" likewise pledges to perform any endeavors related to the mentioned services which fall within the scope of his expertise and professional competency, including, among others:

1. Evaluation of situations affecting the performance of the member (interpersonal and/or family dynamics).

2. Recommendations to resolve situations of referred cases.

3. Outpatient mental health treatment to relieve stress, depression or others, in those cases in which it is called for, through a multi-practice team.

4. Liaison with other entities that may help to resolve cases related to the use of drugs and substances, including alcohol.

The control of cases and services shall be rendered and determined by and in conformity with the need which "THE POLICE" has for same.

SECOND: "HOYOS" pledges to prepare and hand in such reports as are required of him by "THE POLICE" or its authorized representative in relation to his functions.

THIRD: "HOYOS" shall provide his services for a maximum term of one hundred (100) hours per month, during the daily working schedule from 8:00 A.M. to 12:00 M. [sic], with the understanding that said schedule is flexible and that it may exceed four (4) hours a day of work, provided there is a prior agreement on the part of "THE POLICE" or the contractee's supervisor, and he provides leave a written proof of his attendance, if so required.

FOURTH: The contracting parties agree that the services contracted herein shall be renumerated at the rate of fifty dollars ($50.00) per hour. It is further provided that, except when there is prior approval from the Superintendent of the Puerto Rico Police or an authorized representative thereof, the work schedule shall not exceed one hundred (100) hours per month and the maximum amount to be earned by "HOYOS" is not to exceed five thousand ($5,000.00) dollars per month.

FIFTH: The parties agree that the payments shall be made for services rendered monthly and following the

sending of a report and invoice in triplicate, certified by "HOYOS" for the work performed.

SIXTH: No payment shall be made without prior fulfillment of the provisions in the foregoing clause and without the corresponding certification attesting that the services were received by "THE POLICE" or its authorized representative.

SEVENTH: The contract shall be paid by state funds from funds allocated for Professional and Consulting Services for services rendered charged to account number 94-111-040-01-005 of the Puerto Rico Police Operations Budget.

EIGHTH: The professional services agreed to undet this contract shall be provided from September 1, 1993 through June 30, 1994.

NINTH: "HOYOS" shall be considered in the instant contract as a contractor and not as an employee of "THE POLICE". He shall, therefore, not be entitled to regular annual leave, sick leave, or Christmas bonus, nor shall any income tax, Social Security, Retirement System or State Insurance Fund sums be withheld from his pay. "HOYOS" shall be responsible for making the appropriate payments to this effect, both employer and individual. Nevertheless, "THE POLICE" shall notify the Department of the Treasury of the payments which are made to "HOYOS" as fees under the instant contract.

TENTH: The contractee certifies and guarantees that:

[ ] [initials appear inside the forgoing brackets] Has complied with his tax liabilities during the past five (5) years, including the filing of income tax returns.

[ ] He presently has a pending tax debt under a payment plan, and that he is in compliance with its terms and conditions. Moreover, he shall obtain a certification of said tax situation on or before the first payment for his services is made or received. That he does not owe the Commonwealth of Puerto Rico any chattel or real estate taxes or excise taxes.

"HOYOS" expressly acknowledges that this is an essential condition of the instant contract, and should the foregoing certification not be correct in whole or in part, this shall be sufficient cause for the contracting party to vacate the contract and the contracted party shall have to reimburse the contracting party for any sums of money received under this contract.

ELEVENTH: "HOYOS" certifies that he does not receive any payment or compensation for regular services rendered under appointment by any agency, department, entity, public corporation or municipality of the Commonwealth of Puerto Rico. He further states that any other service contract with any other agency is not in conflict entirely or in part with the services being agreed to herein.

TWELFTH: The agreements herein do not limit "HOYOS"'s ability to freely practice his profession as a Psychiatrist, but "HOYOS" expressly acknowledges his duty not to accept any professional or private interest in any matter resulting in a conflict of interest between "HOYOS" and "THE POLICE".

THIRTEENTH: "HOYOS" hereby attests that no one from the Puerto Rico Police of the Commonwealth of Puerto Rico has any monetary financial interest relating to this contract.

FOURTEENTH: The services to be rendered by "HOYOS" cannot be delegated. Any delegation thereof shall be sufficient cause to terminate this contract. Breach of this Clause shall make him liable for any damages caused to "THE POLICE", whether directly or indirectly.

FIFTEENTH: This contract may be terminated by either of the parties through written notice to the other party, with thirty (30) days' advance notice in writing, without the right to any additional compensation except what was earned thereunder up to that date.

SIXTEENTH: Any neglect or abandon on the part of "Hoyos" as to his duties, or should he engage in improper conduct or actions contrary to law, morality or public order, within or without the Police, shall constitute sufficient cause to terminate the contract immediately, without the need for prior notice of more than five (5) working days.

SEVENTEENTH: The clauses of this contract are independent of one another, and should any Court with venue declare one of them invalid, said ruling shall not affect the others, unless so stated expressly by the order of said Court.

EIGHTEENTH: Both parties acknowledge that, pursuant to the rulings in the case of Rafael Flores Roman vs. Jose' Ramos, 90 JTS 132, the manner, way and conditions under which the services herein agreed to are provided

[sic], these health care professionals are covered by the discharge from liability clause, under law No. 55 of July 18, 1978 (26 LPRA 5105).

ACKNOWLEDGEMENT

The appearing parties hereby affirm that we have read this contract in all its parts and that it sets forth what was agreed to; wherefore we hereby accept and ratify it entirely as to its contents, by signing the last page thereof and placing our initials on the margins on the other pages.

(Signature)	(Signature)
PEDRO A. TOLEDO DAVILA, ESQ.	DR. GUILLERMO J. HOYOS PRECSSAS
SUPERINTENDENT	"HOYOS"
PUERTO RICO POLICE	
"THE POLICE"	

CERTIFIED AS A TRUE AND CORRECT TRANSLATION SUBMITTED BY INTERESTED PARTY.

By: /s/ Myra Lopez
MYRA LOPEZ
CERTIFIED US COURT
INTERPRETER AND
TRANSLATOR

COMMONWEALTH OF PUERTO RICO
PUERTO RICO POLICE
PROFESSIONAL AND CONSULTING
SERVICE CONTRACT

In the City of San Juan, Puerto Rico, this 11th day of October, 1993.

THERE APPEAR

AS PARTY OF THE FIRST PART: THE PUERTO RICO POLICE, created by Act Number 26 of August 22, 1974, as amended, represented in this instrument by the Superintendent, Pedro A. Toledo Davila, Esq., of legal age, married and a resident of Rio Piedras, Puerto Rico, with authority to execute this document pursuant to the provisions of Circular Memorandum No. 07-93 issued by the Honorable Secretary of Governance of Puerto Rico, on March 8, 1993, Circular Letter 1300-12-93 of the Department of the Treasury issued on March 19, 1993, Circular Letter 1-88-89 issued by the Executive Director of the Office of Government Ethics on March 30, 1989 and the provisions of the Puerto Rico Civil Code referring to obligations and contracts and hereinafter called "THE POLICE".

AS PARTY OF THE OTHER PART: DR. HECTOR O. RIERA GONZALEZ, of legal age, married, a Psychiatrist by profession, License number 6239, a resident of Rio Piedras, Puerto Rico, with offices in the Las Torres-North Condominium, 1-D, in Bayamon, Puerto Rico 00959, Bearer of Social Security Number 584-20-2632, hereinafter called "DR. RIVERA".

BOTH PARTIES STATE

That the appearing parties have agreed to formalize a professional service contract and are so executing it by means of this instrument, whereby Dr. Hector O. Rivera Gonzalez pledges to render "THE POLICE" the services listed under the following:

CLAUSES AND CONDITIONS

FIRST: "DR. RIVERA" pledges to provide "THE POLICE" with professional services as a Psychiatrist at the Police Medical Office. The services to be offered shall be the following:

a. To offer outpatient mental health attention and psychiatric treatment to members of the Puerto Rico Police.

b. To advise the Director of Medical Services, the Superintendent of Police and the managerial staff thereof in psychiatric matters.

c. To conduct psychiatric evaluations of Members of the Force and civilian personnel, including tests in the event of new arrivals, promotions, transfers and reinstatements to the Puerto Rico.

d. To determine the ability of the members of the force as regards the psychiatric field.

e. To offer out-patient mental health follow-up for cases which have been under treatment at the State Insurance Fund (Workmen's Compensation) and at other medical institutions to evaluate them psychiatrically and to see whether they can remain on the force and to make the corresponding recommendations.

f. To maintain, and keep up-to-date, psychiatric records of the patients.

g. To establish and maintain contact with State and Federal Agencies or private entities having to do with the psychiatric care of members of the Police Force.

h. To attend any psychiatric emergencies which arise at General Headquarters of the Puerto Rico Police during the regular work schedule.

i. He shall advise the Legal Office by means of written reports and/or meetings with attorneys in those cases which so warrant it in the interpretation of psychiatric testing in or outside the case file, as well as appearing as a witness to provide expert testimony or opinions in such cases as are directly related to the report or reports in the administrative and judiciary forums whenever required therefor.

"DR. RIVERA" likewise pledges to perform any endeavors related to the services listed in the foregoing which fall within the scope of his specialty and professional competency, among others inclusive:

1. Evaluation of situations affecting the functioning of the member (interpersonal and/or family dynamics).

2. Recommendations to resolve situations of referred cases.

3. Outpatient mental health treatment to relieve stress, depression or others in those cases in which it is called for, through a multidisciplinary team.

4. Liaison with other entitles that may help to resolve cases related to the use of drugs and substances, including alcohol.

The control of cases and services, shall be rendered and determined by and in conformity with the need which "THE POLICE" have for same.

SECOND: "DR. RIVERA" pledges to prepare and hand in such reports as are required of him by "THE POLICE" or their authorized representative in relation to his functions.

THIRD: "DR. RIVERA" shall provide his services for a maximum term of one hundred (100) hours per month, during the daily working schedule of 8:00 A.M. to 12:00 M. [sic], it being understood that this shall be a flexible one and that it may be greater than four (4) hours a day of work, as long as there is prior agreement on the part of "THE POLICE" or the contractee's supervisor, and he shall leave a written voucher of his attendance, if so required.

FOURTH: The contracting parties agree that the services contracted herein shall be renumerated at the rate of fifty dollars ($50.00) per hour. It is further provided that, except when there is prior approval from the Superintendent of the Puerto Rico Police or an authorized representative thereof, the work schedule shall not exceed one hundred (100) hours per month and the maximum amount to be earned by "DR. RIVERA" is not to exceed five thousand ($5,000.00) dollars per month.

FIFTH: The parties agree that the payments shall be made for services rendered monthly and following the

sending of a report and invoice in triplicate, certified by "DR RIVERA" for the work performed.

SIXTH: No payment shall be made without prior fulfillment of the provisions in the foregoing clause and without the corresponding certification attesting that the services were received by "THE POLICE" or its authorized representative.

SEVENTH: The contract shall be paid by state funds from funds allocated for Professional and Consulting Services for services rendered to account number 94-111-040-01-005 of the Puerto Rico Police Functional Budget.

EIGHTH: The professional services agreed to under this contract shall be provided from September 1, 1993 through June 30, 1994.

NINTH: "DR. RIVERA" shall be considered in the instant contract as a contractor and not as an employee of "THE POLICE". He shall, therefore, not be entitled to regular annual leave, sick leave, or Christmas bonus, nor shall any income tax, Social Security, Retirement System or State Insurance Fund withholdings be withheld from his pay. "DR. RIVERA" shall be responsible for making the appropriate payments to this effect, both employer and individual. Nevertheless, "THE POLICE" shall notify the Department of the Treasury of the payments which are made to "DR. RIVERA" in fees under the instant contract.

TENTH: The contractee certifies and warrants that:

[ ] *[initials appear inside the forgoing brackets]* Has complied with his tax liabilities during the past five (5) years, including the filing of income tax returns.

[ ] He presently has a pending tax debt and has gone on a payment plan, and that he is in compliance with its terms and conditions. Moreover, he shall obtain a certification of said tax situation on or before the first payment for his services is made or received. That he does not owe the Commonwealth of Puerto Rico any chattel or real property taxes or excise taxes.

"DR. RIVERA" expressly acknowledges that this is an essential condition of the instant contract, and should the foregoing certification not be correct in whole or in part, this shall be sufficient cause for the contracting party to annul the contract and the contracted party shall have to reimburse the contracting party for any sums of money received under this contract.

ELEVENTH: "DR. RIVERA" certifies that he does not receive any payment or compensation for regular services rendered under appointment by any agency, department, dependency, public corporation or municipality of the Commonwealth of Puerto Rico. He further states that he maintains a professional service contract with the State Insurance Fund (Workmen's Compensation) and that the work he performs there does not conflict with the services being agreed to herein.

TWELFTH: The agreements here do not limit "DR. RIVERA"'s ability to freely practice his profession as a Psychiatrist, but "DR. RIVERA" expressly acknowledges

his duty not to accept any professional or private interest in any matter resulting in a conflict of interest between "DR. RIVERA" and "THE POLICE".

THIRTEENTH: "DR. RIVERA" attests that no one from the Puerto Rico Police of the Commonwealth of Puerto Rico has any pecuniary interest relating to this contract.

FOURTEENTH: The services to be rendered by "DR. RIVERA" cannot be delegated. The delegation thereof shall be sufficient cause to deem this contract terminated. Breach of this Clause shall make him liable for any damages caused to "THE POLICE", whether directly or indirectly.

FIFTEENTH: This contract may be deemed terminated by either of the parties through written notice to the other party, with thirty (30) days' advance notice in writing, without the right to any additional compensation except what was earned thereunder up to that date.

SIXTEENTH: Should "DR. RIVERA" neglect or abandon his duties, or engage in improper conduct, or actions which go against law, morality or public order, within or without the Police, this shall constitute sufficient cause to terminate the contract immediately, without the need for prior notice of more than five (5) working days.

SEVENTEENTH: The clauses of this contract are independent of one another, and should any competent Court declare one of them invalid, said ruling shall not affect the others, unless so stated expressly by the order of said Court.

EIGHTEENTH: Both parties acknowledge that, pursuant to the rulings in the case of Rafael Flores Romań vs. Jose´ Ramos, 90 JTS 132, the manner, way and conditions under which the services herein agreed to are provided [sic], these health service professionals are covered by the relief from liability clause, based on Act No. 55 of July 18, 1978 (26 LPRA 5105).

READING AND ACCEPTANCE

The appearing parties affirm that we have read this contract in all its parts and find it to have been drafted in conformity with what was agreed to, wherefore we accept and ratify it in the entirety of its contents, by signing it on the last page thereof and placing our initials in the margin of the other pages.

(Signature)
PEDRO A. TOLEDO DAVILA, ESQ.
SUPERINTENDENT
PUERTO RICO POLICE
"THE POLICE"

(Signature)
DR. HECTOR O. RIVERA GONZALEZ
"DR. RIVERA"

United States District Court
for the District of Puerto Rico
– CERTIFIED –
To be a correct translation prepared by
/s/ Thomas H. Kavelin
THOMAS H. KAVELIN,
USDCC
Certified Court Interpreter
Administrative Office of the
United States Courts

IN THE U.S. DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Maria Teresa Diaz; on her own behalf and/or mother and heir to the legal state of Jose Manuel Rosario Diaz:

Maria M. Rosaria Diaz; Maria del Pilar Ramos Lafontaine; Bienvenida Lafontaine; Hector Gabriel Ramos Lafontaine,

Plaintiffs,

v.

Pol. Miguel Diaz Martinez; Pol. Jose Irizary Mendez; Superintendent Pedro A. Toledo Davila; Ismael Betaucourt;

Lt. Domingo Diaz; Lt. Colonel Pablo Santiago Gonzalez; Sgt. Raymondo Morales;

Angel L. Ramos Rivera; Tomas Vazquez Rivera;

Lourdes I. Gonzalez Diaz; Guillermo Jose Hojas; Hector O. Rivera Gonzalez;

Defendants.

Civil No. 94-2184 (HL)

Deposition of:

DR. VICTOR JOSE LLADO DIAZ

which was taken on April 19th, 1996, at the Law Offices of Smith, & Nevares, located at Caso Building PH-2, 1225 Ponce de Leon Avenue, Santurce, Puerto Rico.

* * *

[p. 34] A. Uhm mm, I was told I might but, I haven't had any specific request for other areas nor have I been provided with other documents pertaining to those areas.

Q. Yes, your report dated, April 2, 1996, right?

A. Uhm mm.

Q. Now, if I read your report correctly, in your report you're not saying that the psychiatrists in this case committed any malpractice, are you?

A. No, I haven't said that.

Q. That's right. So essentially, what you're criticizing in your report are some additional measures that you think should have been in place at the Puerto Rico Police Department, is that correct, which were not at the time?

A. Well, and –

Q. Which were not at place at the time?

A. . . . in connection with the functions of the psychiatrist. I mean, I don't want to limit it to the Police Department, per se. But, it also includes the functions of the consultant. It's, again, a interphase or a liaison between the two components.

Q. So, essentially, you're not saying that the psychiatrists involved were negligent in their function or rendering their services, you're just criticizing that, or saying that they might have been able to do

* * *

[p. 67] no mental illness and no psychiatric condition, is that a correct medical diagnosis, yes or no?

A. That's what they stated.

Q. I need an answer, yes or no?

MR. ROLDAN: He said that with all probability he . . .

DEPONENT: What I know today –

MR. OJEDA: No, no, no, I don't want to know what you know today, I want to know what they knew then, what you knew then.

BY MR. OJEDA:

Q. Could you please answer the question, the question I asked you?

A. Could you repeat the question?

Q. The findings or [sic] Dr. Rivera and Dr. Hoyos, on August 27, 1993, that there was no mental illness and no psychiatric conditions, do you agree with that psychiatric finding of Doctor Rivera and Doctor Hoyos?

A. In all probability now, I think that was the case, yes.

Q. Yes?

A. Yes, Sir.

Q. I'm going to go back now to the lawsuit, to the complaint. You never answered what you believed callous disregard was?

[p. 68] A. Yeah, I did.

Q. You did, okay. What is, and then again I'm going to take you, we're not talking about today, we're talking about August 27th, 1993. On that date, what was the callous disregard of Doctor Rivera and Doctor Hoyos?

A. –

Q. Let me, let me . . . It's going to be the same question. Doctor Rivera and Doctor Hoyos, I think it's clear for the, I want to clarify for the record, they evaluated from different dates, a month previously and then on August 27th, they both rendered their medical report. I just want to have that clear.

On August 27, what was the callous disregard of Doctor Hoyos and Doctor Rivera, if any?

A. I never said that they were callously disregarding.

Q. Well, you're a expert witness in a lawsuit that –

ALL: (Discussion in Spanish)

BY MR. RAFAEL OJEDA DIEZ:

Q. So, there wasn't?

A. Well, again, we went though that before, it depends on what you mean by that, I answered, I gave you my definition of what I thought that meant. But, if you're talking about a legal term, then you have to give

* * *